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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 301

LOUIS K. LIGGETT COMPANY ET AL., APPELLANTS,

vs.

J. M. LEE, ~~DOUGLAS AMOS~~, AS COMPTROLLER OF THE STATE OF FLORIDA; ~~H. B. CONERLY~~, AS TAX COLLECTOR OF THE STATE OF FLORIDA, ET AL., ETC.

R. H. MICKLER

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

FILED AUGUST 15, 1932.

(36,998)

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APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

INDEX

	Original	Print
Proceedings in supreme court of Florida	a	1
Caption (omitted in printing)	a	
Record from circuit court of Leon County	1	1
Caption	1	1
Recital as to original bill of complaint	1	1
Recital as to petition of intervention by Paxon's, Inc.	1	1
Recital as to motion to dismiss	1	1
Recital as to order allowing intervention of Paxon's, Inc.	1	1
Order dismissing original bill (omitted in printing)	1	
Petition for rehearing (" " " ")	3	
Order granting rehearing (" " " ")	10	
Notice of application for leave to file amended bill, etc. (omitted in printing)	11	
Objection to filing of amended bill (omitted in printing)	14	
Amended bill of complaint	16	2

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1932

	Original	Print
Exhibit 1—Advertisement showing territory covered by McKesson service	92	58
Exhibit 2—List of McKesson Companies	93	59
Exhibit 3—Excerpt from classified section of telephone book	94	61
Exhibit 4—Section of Florida Times-Union, September 12, 1931	96	72
Exhibit 5—Form of agreement	97	73
Exhibit 6—Newspaper advertisement of I. G. A. stores	102	76
Exhibit 7—Newspaper advertisement of I. G. A. stores	103	76
Motion to dismiss amended bill	104	77
Affidavit of G. D. Wood	107	78
Exhibit 1—Petition for leave to intervene by Independent Furniture Co.	109	79
Order allowing intervention of Southern Stores Corp. et al.	115	83
Petition of intervention by Nunnally Co.	116	84
Exhibit 1—Form of application for license to operate stores in Florida	123	88
Petition of intervention by Melville Shoe Corporation et al.	124	89
Petition of intervention by Southern Stores Corporation et al.	137	97
Final decree	143	101
Notice and entry of appeal	145	102
Assignments of error	148	103
Stipulation of counsel for preparation of transcript of record (omitted in printing)	151	
Certificate of clerk (omitted in printing)	155	
Argument and submission (omitted in printing)	156	
Opinion, Terrell, J.	158	105
Concurring opinion, Davis, J.	180	121
Dissenting opinion, Brown, J.	180a	122
Judgment	198	148
Amended petition for rehearing	201	148
Order denying rehearing	216	159
Petition for appeal	218	160
Assignments of error (omitted in printing)	228	
Order allowing appeal	234	166
Citation and service (omitted in printing)	238	
Bond on appeal (omitted in printing)	241	
Praecipe for transcript of record	248	168
Clerk's certificate (omitted in printing)	250	
Statement of points to be relied upon and designation of parts of record to be printed	252	169
Stipulation as to printing amended assignments of error and certified copy thereof	256	172

[fols. a & b] [Caption omitted]

[fols. 1 & 2] TRANSCRIPT OF RECORD OF PROCEEDINGS IN THE

CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA

In the Suit of LOUIS K. LIGGETT COMPANY, a Corporation, et al., Complainants, and the NUNNALLY COMPANY, a Corporation, et al., Intervenors, against ERNEST AMOS, as Comptroller of the State of Florida, et al., Dependants, Therein Pending

RECITAL AS TO ORIGINAL BILL OF COMPLAINT, ETC.

On September 30, 1931, the Complainants filed their original bill of complaint.

On October 3, 1931, Paxson's Inc. a Corporation, filed its Petition and Intervention.

On October 6, 1931, the Defendants filed their Motion to Dismiss Complainants' Bill of Complaint.

On October 9, 1931, the Court made its order allowing Paxson's Inc. a Corporation to intervene.

On October 19, 1931, the Court made his Order dismissing the original bill of complaint, said order being recorded in Chancery Order Book 9, page 544, and being in the words and figures following:

Order dismissing original bill omitted in printing.

[fols. 3 9] On December 5th, 1931 the complainants filed Petition for Rehearing in words and figures following:

Petition for rehearing omitted in printing.

[fol. 10] On November 5, 1931, the Court made order granting Complainants a Rehearing, said order being recorded in Chancery Order Book 9, page 565, and being in the words and figures following:

Order granting rehearing omitted in printing.

[fols. 11-13] On November 12, 1931, Complainants filed Notice of Application for Leave to file Amended Bill and for a temporary restraining order, same being in the words and figures following:

Notice omitted in printing.

[fols. 14 & 15] On the 12th day of November, 1931, Defendants filed Objection to Filing Amended Bill in words and figures following:

Objection omitted in printing:

[fol. 16] In Circuit Court of Leon County, Florida

In Chancery

Louis K. Liggett Company, a Corporation; Winn & Lovett Grocery Company, a Corporation, and Paxson's, Inc., a Corporation, Complainants,

vs.

Ernest Amos, as Comptroller of the State of Florida; K. B. Council, as Tax Collector of Leon County, Florida, and R. F. Bowden, as Tax Collector of Duval County, Florida, Defendants

Amended Bill of Complaint—Filed Nov. 12, 1931

To one of the Honorable Judges of said Court, in chancery sitting:

Your Orators Louis K. Liggett Company, a Corporation, Winn & Lovett Grocery Company, a Corporation, and Paxson's Inc. a Corporation, Bring this their amended bill of complaint against Ernest Amos as Comptroller of the State of Florida, K. B. Council as Tax Collector of Leon County, Florida, and R. F. Bowden as Tax Collector of Duval County, Florida, defendants; and thereupon your orators complain and say:

I

That your orator Louis K. Liggett Company is a corporation organized and existing under the laws of the State of Massachusetts, and lawfully doing business in the State of Florida. That your orator Winn & Lovett Grocery Company is a corporation organized and existing and lawfully doing business under the laws of the State of Florida. That your orator Paxson's Inc. is a corporation organized and [fol. 17] existing under the laws of Florida, and lawfully doing business in the State of Florida. That the defendant Ernest Amos, Comptroller, is Comptroller of the State of Florida, having his official residence in Tallahassee, Florida, in the County where this suit is instituted; that the defendant R. B. Council, Tax Collector, is Tax Collector of Leon County, Florida, and a resident and citizen of said County; that the defendant R. F. Bowden, Tax Collector, is Tax Collector of Duval County, Florida, and is a citizen and resident of said Duval County.

II

That this suit is brought as a class suit, for the benefit of the complainants and all other merchants similarly situated who may desire to avail themselves of the benefit hereof, for the purpose of showing the invalidity and unconstitutionality of Chapter 15624 Laws of Florida, 1931, also known as Committee Substitute for House Bill No. 8-X. That said Act affects every merchant doing business in the State of Florida, whether operating one store or more than one store. That the license tax on single store operators is practically double what it has heretofore been under sec. 926 Revised General Statutes of Florida. That as to owners and operators of more than one store said Act undertakes to provide a graduated scale of License fees, State, County and municipal in an ascending ratio. That said Act also undertakes by an ascending scale of arbitrary license fees to make very great discriminations between merchants owning and operating stores in only one County and those operating stores in different counties of the State. That the number of merchants operating in the State of Florida is so great that it would be next to impossible and [fol. 18] impracticable to name all of them in one bill of complaint, or to describe their several methods of doing

business, or the several conditions under which they do business. Nevertheless, all such merchants wherever situated have similar rights and similar causes to complain of the provisions and operation of said Act. That the complainants and all other merchants in the State of Florida are similarly interested in preventing the enforcement of said Act.

III

Your orators would further show that your orator Louis K. Liggett Company owns and operates twenty-two (22) retail drug stores in the State of Florida, situated as follows:

Hillsborough County	3
Duval County	3
Dade County	7
Orange County	1
Polk County	2
Sarasota County	1
Suwannee County	1
Brevard County	2
Palm Beach County	1
Pinellas County	1

That your orator Winn & Lovett Grocery Company owns and operates fifty-eight (58) retail grocery stores in the State of Florida, situated as follows:

Duval County	23
Molusia County	6
Marion County	2
Lake County	2
Columbia County	1
St. Johns County	1
Putnam County	1
Taylor County	1
Suwannee County	1
Osceola County	1
Alachua County	1
Leon County	1
Brevard County	3
Indian River County	1
St. Lucie County	2

Martin County	1
Orange County	4
Seminole County	4
Polk County	2

[fol. 19] That your orator Paxson's Inc., owns and operates eight (8) retail shoe stores, one in the State of Georgia, and seven (7) in the State of Florida, situated as follows:

Duval County	3
Hillsborough County	1
Volusia County	1
Palm Beach County	1
Alachua County	1

IV

Your orators would further show that each of the Florida stores operated by them severally, as aforesaid, constitutes a "store" within the meaning of sec. 8 of said chapter 15624 Laws of Florida, 1931, also known as Committee Substitute for House Bill No. 8-X, passed at the first extra Session of the Florida Legislature which convened in the year 1931. That the said Act of the Legislature attempted to impose sundry arbitrary and unreasonable discriminations and tax burdens upon your orators and all other merchants similarly situated, all of which will be more particularly hereinafter shown. But your orators aver first of all, that, as appears by the Journals of said extra session of said Legislature, the said Act was not passed in the manner and form required by sec. 17 art. III, and sec. 8 art. IV of the Constitution of Florida, on which account, as your orators are advised and believe, and so aver, said Act never becomes a law, and has no binding force upon your orators or other merchants in the State of Florida similarly situated. That on June 6, 1931, the Governor of Florida issued his proclamation convening the Legislature in extraordinary session, in accordance with sec. 8, art. IV, of the Florida Constitution, and in his proclamation the Governor stated four purposes for which the Legislature was convened, i. e.:

[fol. 20] "1. To provide revenues apart from the general property tax to meet the requirements of the schools,

it is an idle ceremony to make appropriations without revenue to meet them.

2. To provide new sources of revenue, not to increase our burdens, but solely for the purpose of relieving the General Property Tax, particularly the State Ad Valorem.

3. The allocation of our present Gas Tax on a formula that is fair throughout the State and that will end contention between big and little counties. I caution you against arbitrary standards and again urge the Federal allocation as a sound basis.

4. Better machinery for tax collection and a Tax Cimmission of three members, authorized to adjust and assi-t in the collection of past due taxes, place on ours rolls property now escaping taxations, assist in working out our tax problems and give stability to our entire tax structure."

That said chapter 15624, Committee Substitute for House Bill No. 8-X, cannot come within either the third or fourth purposes above quoted. Neither can said Bill come within the second purpose above quoted for the reason that license taxes upon merchants was not a new sort of revenue, all merchants being theretofore subject to license taxes, pursuant to the terms of sec. 926 Revised General Statutes of Florida (Sec. 1197 Compiled General Laws of Florida). That said Bill did not and could not come within the first purpose of the Governor's proclamation above quoted, for the reason that the revenue to be derived from said Act or Bill was not appropriated to meet the requirements of schools. On the contrary, the State revenue to be derived therefrom was to go into the general funds of the State, and by sec. 11 of said Bill the County license tax was to become a part of the general funds of the County, and the municipal license taxes provided for by the same section were to become the general funds of the several municipalities of the State. That said Bill, not being [fol. 21] within the special purposes defined by the Governor's proclamation, as aforesaid, it was requisite that each "legislative step" or "legislative business" transacted in the matter of the passage of said Act should be concurred in by a two-thirds vote of the respective Houses of the Legislature where such legislative steps were taken, such

eing the requirement of sec. 8, art. IV of the Florida Con-
itution. That it appears by the House Journal of June 15,
31, page 9, that the introduction in the House of Com-
ittee Substitute for House Bill No. 8-X was agreed to by
two-thirds vote, and said Bill read for the first time by
s title only. But it also appears by the same page of said
ournal, that after being so read for the first time, motion
as made to recommit said Bill to the House Committee on
inance and Taxation, which was agreed to, but not by a
vo-thirds vote. It also appears by the House Journal of
une 19, 1931, page 27, that Committee Substitute for
ouse Bill No. 8-X, sec. 8 was amended by adding the fol-
wing thereto:

"Provided, however, the term "store" shall not include
lling stations engaged exclusively in the sale of gasoline
nd other petroleum products."

Which amendment was agreed to, but not by a two-thirds
ote. On the same page of the same Journal it also appears
hat two other amendments to said Bill were made at the
ame time and agreed to, but not by a two-thirds vote.
That by the Senate Journal of June 20, 1931, page 7, it
ppears that said House Bill was reported to the Senate
nd that—

"Committee Substitute for House Bill No. 8-X, contained
n the above message, was permitted to be introduced into
he Senate by the Constitutional two-thirds vote."

Thus recognising that said Bill was not within the purposes
f the Governor's proclamation convening said extra
[fol. 22] session. That, as appears by the Senate Journal
f June 23, 1931, pages 2 and 3, the Senate Committee on
inance and Taxation reported said Committee Substitute
or House Bill No. 8-X, with a proposed amendment to
trike out the brack-ts of arbitrary state license fees con-
ained in Sec. 8 of said House Bill, and to substitute in lieu
hereof an entirely new set of brackets creating a different
cale of license fees to be collected according to whether the
erchant does business wholly in one County, or in more
han one County. That, as appears by the Senate Journal
f June 24, 1931, page 6, said Bill was read in the Senate a
econd time in full, and the aforesaid amendment recom-

mended by the Senate Committee on Finance and Taxation was adopted, but not by a two-thirds vote. That at the same time another amendment to sec. 14 of said Bill was made in the Senate and adopted, but not by a two-thirds vote. That, as appears by the House Journal of June 24, 1931, pages 16 and 17, the House received a Senate message, reporting that Committee Substitute for House-Bill No. 8-X, with two Senate amendments had been passed by the Senate. Whereupon motion was made to concur in said Senate amendment #1, amending sec. 5 of the Bill, which was agreed to, but not by a two-thirds vote. That by another motion, the second Senate amendment, that is to say amending sec. 14 of the Bill, was agreed to by the House, but not by a two-thirds vote. That thereupon said Bill, with the Senate Amendments concurred in in the manner aforesaid, was ordered referred to the Committee on Engrossed Bills—at least that appears to have been the intention, though the number of the Bill was omitted in making the reference, as appears by the House Journal of June 24, page 17. That afterwards, as appears by the [fol. 23] House Journal of June 25, 1931, page 3, the Committee on Engrossed Bills reported that said Committee Substitute for House Bill No. 8-X has been properly engrossed; and thereupon said Bill was referred to the Committee on Enrolled Bills. Thereafter, as appears by the Journals of the House and Senate, said Bill was signed by the presiding officers of the House and Senate, and by the Chief Clerk of the House and the Secretary of the Senate respectively. But no roll call upon said Bills was had in the house after the Senate amendments as aforesaid, nor did the House, after receiving the Bill with amendments back from the Senate, ever take any further action of any sort with respect thereto by a two-thirds vote.

V

Your orators would further show that the present day chain store or multiple store method of merchandising is a product of rapidly changing economic conditions, which have developed since the World War. That the economic changes which have caused the rapid development of chain store merchandising have been fostered and encouraged by the federal and state governments of the United States.

That said Chap. 15624 Laws of Florida, 1931, is only a part of a widespread campaign, having for its chief purpose the destruction or breaking up of chain store merchandising, for the benefit and protection of a class of inefficient and unprogressive merchants, who refuse to readjust their businesses so as to conform to those changes in economic conditions developed since the World War, as aforesaid. That said Act carried evidence of its purpose and character, as aforesaid, upon its face, in addition to which the history of chain store merchandising, the economic changes since the World War, and the widespread [fol. 24] anti-chain store campaign developed in the last few years, of which said Act is a part, all show that said Act, under the guise of a revenue measure, was designed and intended to destroy or arbitrarily burden a method of merchandising which has become an economic necessity.

VI

Your orators would further show that the chain store method of merchandising in America dates back to the hundreds of trading posts established by the Hudson Bay Company, during the colonial period. That the earliest of the modern chain stores was started by George Huntington Hartford, a clerk of George Gilman, in 1859. That from the one store started by Hartford there originated the Great Atlantic & Pacific Tea Company, which in 1930 had more than fifteen thousand retail grocery stores in the United States. That following the depression resulting from the Civil War, Frank W. Woolworth, a $5.00 a week clerk in the small town of Watertown, New York, opened his first store, from which has developed the national chain known as Woolworth's 5 & 10 Cent Stores. That during the succeeding years up to 1900 many other great merchants founded chain store systems, such as Kress, Penney, Kroger and others. That in almost every instance what are now nationally known chain stores had their beginnings with single stores. That up to 1900 the chain store method of merchandising was of slow growth, each merchant using his earnings to expand his business with added stores. That during the period from 1900 to 1919, with the coming of the automobile and a large shifting of population from the country to the cities, the

chain stores took on a more rapid growth. That during [fol. 25] the World War the resources of the United States were mobilized for mass production, for mass consumption, after mass transportation. That the factories and producers were developed to the highest possible state of capacity and efficiency. That after the close of the War that vast machinery for production found itself without adequate outlet, and during the years 1920, 1921 and 1922, a great financial depression came over the whole country similar to that which now exists. Thousands of merchants found themselves heavily loaded with stocks of goods bought at war prices, with the result that bankruptcies were general, and an era of hand to mouth buying ensued, compelling factories and sources of production to shut down or greatly curtail their output. Money became scarce, and the consumer was seeking where he could buy the necessities of life at the lowest possible figure. In conjunction with these conditions, Mr. Hoover, now President of the United States, became Secretary of Commerce. He had been Food Administrator during the War, and had become accustomed to dealing with mass production and mass distribution direct from producer to consumer. When he became Secretary of Commerce he found an appalling waste between the producer and the consumer, and this became more acute by the depression and era of hand to mouth buying which occurred during 1920 and 1922 as aforesaid. Under these conditions Mr. Hoover set himself to the task of eliminating such economic waste. That after having spent several years of effort to solve such problems, Mr. Hoover, in an address before the Chamber of Commerce of the United States, at Washington, D. C., January 14, 1925, complaining of economic wastes, roughly catalogued them as follows:

[fol. 26.] 1. Waste from the speculation, relaxation of effort and extravagance of booms with the infinite waste and unemployment and bankruptcy which comes with the inevitable slump.

2. Waste from excessive seasonal character of production and distribution.

3. Waste caused through lack of information as to national stocks, of production and consumption with its attendant risk and speculation.

4. Waste from lack of standards of quality and grades.

5. Waste from unnecessary multiplication of terms, sizes and varieties.

6. Waste from lack of uniformity of business practices in terms and documents, with resultant misunderstandings, frauds and dis-utes.

7. Waste due to deterioration of commodities.

8. Waste due to inadequate transportation and terminals, to inefficient loading and shipping and unnecessary haulage.

9. Waste due to disorderly marketing, particularly of perishables, with its attendant gluts and famines.

10. Waste due to too many links in the distribution chain and too many chains in the system.

11. Waste due to bad credits.

12. Waste due to destructive competition of people who are in fact exhausting their capital through little understanding of the fundamentals of business in which they are engaged.

13. Waste due to enormous expenditure of effort and money in advertising and sales promotion effort, without adequate basic information on which to base sales promotion.

14. Waste due to unfair practices of a small minority.

15. A multitude of wastes in use of materials, in un*usu*-ecessary fire destruction, in traffic*e* accidents, and many other directions.

That the chain stores of the country, with their methods of merchandising as more particularly hereinafter explained, answered the call of Mr. Hoover even before the [fol. 27] speech made as aforesaid, and during the past decade have succeeded in saving many Billions of dollars to the consumers of the United States, which otherwise would have been economic waste. That when Mr. Hoover was Secretary of Commerce he stated that at least eight billion dollars was wasted annually through ineffi-

cient marketing, and it was then estimated that only about one-third of every American Dollar spent in the stores covered the actual cost of production, while the other two thirds was absorbed in the process of distribution. That in a recent investigation made by Harvard Bureau of Business Research it has been found that in the grocery field chain stores are able to operate on less than 20% of the consumers' dollar, of which about 1¾% is net profit, leaving 80% to go to the producer; also that similar savings have been accomplished in other fields by chain stores in other classes of merchandise, so that chain store methods of merchandising have gone a long way towards eliminating the tragic economic waste of which Mr. Hoover spoke. That the public policy so inaugurated by Mr. Hoover, was also fostered by State governments, including the State of Florida, as evidenced by Chap. 9300 Laws of Florida, 1923, authorizing the formation of cooperative marketing associations, the declared policy of which was to eliminate speculation and waste between the producer and the consumer.

Your orators would further show that the more general use of motor vehicles during the last decade, and the development of State and national highways have also had a material influence on the growth and development of the chain store method of merchandising. That two decades ago the shopping district of any City of consequence was in a comparatively restricted area, for groceries, as well as dry goods and other retail merchandise. But with the advent of the automobile residential districts [fol. 28] spread out over wide territory, and as the use of motor vehicles increased the congestion in the shopping district became so great that the consumers demanded a more convenient place to shop, with the result that small shopping *centers* began to develop, widely scattered, convenient to residential districts. That in the grocery line the chain store was a natural means of serving such individual community centers, and the same is true of the *drug* line. That on account of this economic change the so-called independent single store operators would have a monopoly in such small trading centers if the chain store operator is prohibited by discriminatory legislation from having more than one store.

Your orators would farther show that the State and Federal Governments have built hard surfaced highways throughout the country at public expense, including the State of Florida, so that during the last decade farmers and residents of small towns can more easily reach the large trading center, where they can take advantage of the lower cost for standard merchandise offered by chain store merchants; whereas, on the other hand, the same highways afford facilities for establishing chain store units in small towns, and serving them quickly and efficiently by motor truck transportation from warehouse centers. That merchandising experts, after having made exhaustive field tests in the grocery business, estimate that on an average throughout the United States customers of chain store grocers are able to save anywhere from 10 to 14 per cent on the selling price of the merchandise. That chain store grocers in the United States did a total business in 1930 of $3,500,000,000. That on the basis of a 10% saving, this means a saving to consumers in the United States in one year, on groceries alone, of $350,000,000.00. That in times of depression such as these the method of merchandising [fol. 29] which produces such savings to the consuming public becomes an economic necessity.

That during the past five years there has been a concerted and wide spread anti-chain store movement in the United States, similar to the anti-department store agitation in 1895, and later, the anti-mail order house agitation. That the brunt of the campaign against chain stores has been carried on by three classes of agitators: (1) middlemen who absorbed a large part of the consumers' dollar in getting commodities from the producer to the consumer; (2) self appointed champions of the anti-chain store movement; and (3) politicians. That the self appointed champions received large rewards in the shape of fees, dues, assessments, subscriptions and promotional expenses. That the politician became an agitator because it appeared to be a vote getting process. But notwithstanding agitation developed from these several sources, the more capable and forward looking merchants began cleaning house, reorganizing their stores, installing modern equipment, and adopting the best features of merchandising which has been shown them by chain store operators. That Chapter 15624,

Laws of Florida, 1931, is a product of such anti-chain store agitation, and, if upheld, will bring back, or tend to bring back, those economic wastes which the federal and state governments have during the last decade been endeavoring to eliminate. That the effect of said Act will be to stifle competition and restrict your orators in engaging in free trade and commerce with the citizens of this State, contrary to sec. 1 of the Florida Declaration of Rights, and contrary to the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution.

[fol. 30] VII

Your orators would further show that as applied to each of them severally, and as applied to the owners and operators of other stores in the State of Florida similarly situated, the said Chap. 15624, Laws of Florida, 1931, violate the "equal rights" clauses and the "due process" clauses of sections 1, 4 and 12 of the Florida Declaration of Rights, and the "due process" clause and the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution in the following particulars:

(a) That the sub sections 1, 2, 4, 6, 8 and 10 of sec. 5 of said Act create oppressive, arbitrary and unreasonable discriminations between single store merchants and your orators severally, contrary to the provisions of the state and federal constitutions as aforesaid. That the arbitrary state license fees prescribed by sec. 5 (1) of said Act, to be imposed upon the opening, establishing, operating and maintaining of one store, regardless of size, as, for instance, Cohen Brothers, the largest department store in the City of Jacksonville, Florida, covering a whole block, is $5.00, whereas upon each of the fifty-eight stores owned and operated by your orator Winn & Lovett Grocery Company, in the State of Florida, being in excess of 50 and not more than 75, located in different counties, the arbitrary annual state license fee is $40.00 per store in excess of fifty stores, and for lesser graduated amounts for each store below fifty, as provided by the sundry sub-sections of sec. 5 of said Act. That the arbitrary annual state license fee as applied to your orator Louis K. Liggett Company, owning and operating 22 stores in different counties, as aforesaid, is $20.00 for each store in excess of fifteen, and for

lesser graduated amounts for each store below fifteen, as [fol. 31] provided for in the sub-sections to sec. 5 of said Act. That like arbitrary differences exist between a single shoe store operator and your orator, Paxson's, Inc., owning and operating seven shoe stores in different Counties in Florida, as aforesaid. That the particular discriminations aforesaid are predicated purely upon the number of roofs under which a merchant does business.

(b) That sub-sections 1 to 11, inclusive, of sec. 5 of said Act create oppressive, arbitrary and unreasonable discriminations between merchants doing business in one County only, and merchants doing business in different counties of the State of Florida (as is the case of your orators in this suit), contrary to the provisions of the state and federal constitutions severally as aforesaid.

That in the ascending brackets of sec. 5 of said Act, from one to more than seventy-five stores, the arbitrary state license fee to be charged is from fifty to twenty-five per cent higher if the stores of a chain or multiple store operator are operated in more than one County than if the same number of stores are operated by a chain or multiple store operator in one county only. That, as more particularly hereinafter shown, one Georgia C. Blume owns and operates in Duval County, Florida, thirty-seven grocery stores, known as "Whiddon's Stores," similar to the twenty-three grocery stores in Duval County, Florida owned and operated by your orator, Winn & Lovett Grocery Company. That under the schedule of arbitrary state license fees provided by the sub-sections of sec. 5 of said Act, [fol. 32] your orator, Winn & Lovett Grocery Company, on each of its twenty-three grocery stores operated in Duval County, Florida, is required to pay an arbitrary state license fee of $24.74 per store, in addition to $3.00 per $1,000.00 on stock carried, whereas the arbitrary state license fee chargeable to each of the thirty-seven Whiddon Stores, operated wholly in said County, as aforesaid, under the schedule provided for under said Act, is $13.78 per store. That, as more particularly hereinafter shown, the Whiddon grocery stores are operated under precisely the same circumstances and in the same manner as the grocery stores operated by your orator, Winn & Lovett Grocery Company, as aforesaid. That similar discriminations exist

under said Act as between each of your other orators operating stores in more than one County, and similar merchants operating more than one store, drug store or shoe store, as the case may be, in only one county. And your orators aver that no justification whatsoever can be found for such further oppressive, arbitrary and unreasonable sub-classification, based solely upon the fact that the merchant does business in more than one county of this State.

(c) That sec. 11 of said Act in undertaking to describe the amount of county license fees and municipal license fees payable by all merchants in the State of Florida, including chain or multiple store merchants, uses as a basis therefor the graduated scale of arbitrary state license fees provided for in subsections 1 to 11, inclusive, of sec. 5 of said Act, save that County and municipal license fees are to be calculated upon the number of stores of each merchant found in the particular county or municipality, without regard to the number of stores that may be owned by [fol. 33] such chain or multiple store operator in other counties or municipalities. That with this exception as to the basis of calculation, sec. 11 of said Act is oppressive, arbitrary and unreasonable, and violates the aforesaid provisions of the State and Federal constitutions severally for the same reasons as pointed out aforesaid with respect to sec. 5 of said Act.

(d) That the provisions of sec. 8, last clause of sec. 5 and sec. 2 of said Act, exempting wholesale merchants, who remain subject to the license taxes provided for by sec. 926, revised General Statutes of Florida (sec. 1197 C. G. L.) create oppressive, arbitrary and unreasonable discriminations against all multiple store merchants who own and operate warehouses in the State of Florida, that stand in the same relation to their several retail units in this State which the wholesale merchants bear to the several retail merchants, contrary to the provisions of the state and federal constitutions severally as aforesaid. That by sec. 8 of said Act, defining the term "store," the name is made applicable only to owners and operators of stores as defined in said Act—

"in which goods, wares and merchandise of any kind are sold *at retail*."

That, being so limited, said Act has no application to stores in which goods, wares and merchandise of any kind are sold at wholesale. That by the last clause of sec. 5 of said Act all merchants, in addition to the arbitrary state license fees provided in subsections 1 to 11, inclusive, of said sec. 5, are required to pay an additional state license fee of

"$3.00 for each and every $1,000.00 of value of stock carried in each store or *for sale in each such store.*"

[fol. 34] That the words "for sale in each such store" are interpreted by the provisions of sec. 2 of said Act, requiring a sworn return by each applicant for a license of the full actual value of the stock of goods, wares, merchandise and commodities—

"from which sales are to be made, including all goods, wares, merchandise and commodities owned by the merchants and held in storage to be sold in or through such store."

That by combination of the provisions of sees. 5 and 2 last quoted, said Act undertakes to impose upon your orator Winn & Lovett Grocery Company, owning a principal warehouse in Jacksonville, Florida, and another in Sanford, Florida, a license fee of $3.00 per $1,000.00 on all merchandise carried in warehouse for sale through its several 38 retail units; whereas no such burden is imposed upon wholesale grocery companies supplying singly owned and operated grocery stores in this State. That the provisions of said Act last above mentioned in like manner create the same discriminations against other chain or multiple store operators owning and operating warehouses in this State for the same purpose as the warehouses owned and operated by your orator, Winn & Lovett Grocery Company, as aforesaid.

(e) That the proviso contained in sec. 8 of said Act, undertaking to exempt filling stations engaged exclusively in the sale of gasoline and other petroleum products, creates an oppressive, arbitrary and unreasonable classification and discrimination against the owners of all other stores as defined in said Act, contrary to the aforesaid provisions of the State and federal constitutions severally. That section

[fol. 35] 8 of said Act, after defining the term "store," as used in said Act, carries a proviso to the effect that the term "store"—

"shall not include filling stations engaged exclusively in the sale of gasoline or other petroleum products."

Whereas there is no reasonable ground for such exemption as applied to chain or multiple store operators such as your orators, and much less as to chain or multiple store operators of filling stations not engaged exclusively in the sale of gasoline or other petroleum products. That there are many oil companies operating chains of filling stations in the State of Florida, one of which is the Standard Oil Company, and that Company sells at such stations tires and tubes. That other Oil Companies owning chains of filling stations in the State of Florida sell automobile accessories, and some sell cold drinks, fruit, chewing gum and the like; all of which would come within the provisions of said Act where they do not confine their sales exclusively to the sale of gasoline or other petroleum products.

(f) That sec. 2 of said Act requires that the procuring of the initial license under said Act the applicant shall make a return of the full actual value of the stock of goods, wares, merchandise and commodities from which sales are to be made, including all goods, wares, merchandise and commodities owned by the applicant and held in storage, to be sold in or through such store, under oath, and the making of such sworn returns is a condition precedent to the obtaining of a license. That section 9 of said Act provided over penalties for the violation of any provision thereof, each day's violation to constitute a separate and distinct offense. That sec. 4 of said Act does not in terms provide [fol. 36] for compulsory return of the full actual value, etc., but vests in the Comptroller the power to prescribe the forms on which application for renewing licenses shall be made, thus placing it within his authority to require sworn returns the same as under sec. 2 of said Act. That the defendant Comptroller has already prescribed and distributed forms to the Tax Collectors in the State of Florida, and they in turn to the merchants of the State, requiring such sworn returns. That there is no law in the State of Florida providing for compulsory sworn returns of personal property, tangible or intangible, as the basis for the

imposition of an ad valorem tax. That the provisions of said Act last aforesaid create an oppressive, arbitrary and unreasonable classification, in that the same authorize the Tax Collectors of the several counties, or the Comptroller, as the case may be, in the event certain defaults are made for certain periods, as defined in sec. 4 of said Act, in the application for a*n* procurement of a license, to impose a penalty of twenty-five (25%) per cent of the license tax provided by said Act. That the additional tax so provided for, and to be imposed by said officials, is a further deprivation to your orators, and other merchants similarly situated, of their property without due process of law, and of the equal protection of the laws, contrary to the provisions of the state and federal constitutions severally, as aforesaid.

VIII

Your orators would further show that your orator Louis K. Liggett Company operates its drug stores in the several counties of Florida as aforesaid in the same way that other [fol. 37] drug stores in the State are operated, whether owned singly or otherwise. That the stocks of merchandise consist principally of medicines, drugs, surgical and hospital supplies, toilet goods, soaps, candies, cigars, cigarettes, chewing gum, notions, dairy products, fruits, food stuffs and the like. That the merchandise dispensed at the soda fountains in such stores is very largely purchased locally where each respective store is situated, consisting of such items as milk, foodstuffs, ice cream, fruits, nuts, etc. That the owners of single drug stores purchase the same sort of merchandise in the same way and through the same sources. That your orator Louis K. Liggett Company purchases cigars, cigarettes and tobaccos from the manufacturers of those products, and shipments thereof are made direct to the stores where needed, substantially in the same manner that those classes of goods are purchased and received by the owners of single drug stores. That some of the medicines and toilet goods are first purchased by your orator, Louis K. Liggett Company, and collected in its principal warehouse in New York City, from which shipments in interstate commerce are made weekly or bi-monthly, on requisitions by the individual stores located in the State of Florida and in other States. That such frequent shipments are necessary in or-

der to permit more rapid turn over, keep fresh goods in said retail units, and prevent the accumulation of old or shelf worn stock. That the owner of a single drug store ordinarily buys his supplies of medicines and toilet articles from the manufacturers, jobbers or wholesalers, and shipments are made either from some factory or some Florida wholesale warehouse. That stocks of candies, chewing gum and the like are in part supplied from the New York central warehouse, and in part forwarded direct from the factories, all moving in interstate commerce. That there is [fol. 38] no substantial difference between the complainant's method of doing business and the methods used by single drug store owners. And this complainant Louis K. Liggett Company further says that it has other competitors besides drug stores singly owned, in the several towns where this complainant's stores are located—that is to say, department stores, who handle many articles and classes of merchandise, candies, cigars, toilet articles and the like, which are ordinarily handled in each of this complainant's drug stores. That cigar stores handle cigars, cigarettes and tobaccos, and other like merchandise carried in the stocks of this complainant. That confectioners and candy stores carry candies, nuts, confections and soda fountain supplies. That none of such competitors, if operating only one store, are subjected to the very great additional burdens and discriminations attempted to be created by the aforesaid Act, particularized in the preceding section of this Bill. That no business advantage results to this complainant by buying merchandise in large quantities and centralizing the same in a central warehouse, but the operation of such central warehouse involves the expense of the capital invested in such stock of merchandise centrally located, the interest thereon, the taxes and insurance on such merchandise, investment in warehouse, and the freight paid from such warehouse to the several stores. None of these items of expense or burdens are borne by the owners of single drug stores, who ordinarily purchase their merchandise locally from brokers or wholesalers, as above set forth.

That none of the stores operated by this complainant in the State of Florida increase the fire hazards, or endanger the health or morale of the community, or require increased [fol. 39] or additional police protection, different from the

stores operated by other druggists or merchants doing a similar business, or handling other merchandise. That the aforesaid Act of the legislature was not intended as a police measure. On the contrary, said Act was designed and intended as a restriction and prohibition on the so-called chain method of owning and operating drug stores, and other businesses of similar character. That the means to that end was the imposition of the many discriminations and additional burdens of tax pointed out in the preceding section of this Bill. That solely by reason of the fact that Louis K. Liggett Company owns twenty-two drug stores located in different Counties of Florida, the average arbitrary state license fee, exclusive of the $3.00 per $1,000.00 on stock carried, assessable to each Liggett store under said Act, is $16.00 per store; whereas drug stores singly owned and competing with such Liggett stores, doing the same type and character of business, and carried on in substantially the same manner, are each taxed with an arbitrary state license fee of $5.00 only. That the 22 Liggett stores operated in Florida, as aforesaid, are burdened with arbitrary state license fees in the aggregate amount of $355.00—whereas 22 individually *and operated* owned drug stores, competing with the Liggett stores, as aforesaid, are accessable with total arbitrary state license fees as aforesaid in the sum of only $110.00. That such discrimination is oppressive, arbitrary and unreasonable, and without just basis. That as further illustrating the discrimination created by said Act, your orator, Louis K. Liggett Company, avers that the drug store is Miami, Florida, known as the [fol. 40] Red Cross Pharmacy, doing a larger drug business, similar to that of your complainant, and, as your orator is informed and believes, the largest drug business in Florida, will pay under said Act an arbitrary state license fee of only $5.00, because the owners operates no other drug store in the state; whereas this complainant operating the same character of drug stores in that vicinity is charged with an arbitrary license fee on each of said stores in the sum of $16.00. That as further illustrating the same proposition, this complainant avers that McElroy's Drug Store, operated in the City of Orlando, Florida, does as much or more business than any Liggett store in said City—nevertheless, said McElroy store, on account of the owner not owning and operating any other drug store,

is assessed under said Act with an arbitrary state license fee of only $5.00, and the Liggett Stores operated in that community by this Complainant are each assessed under said Act with an arbitrary state license fee of $16.00 for doing precisely the same kind of business.

XX

Your orators would further show that your orator Louis K. Liggett Company has competition in the State of Florida, not only from the individually owned drug stores, as mentioned in the last preceeding paragraph, but also from a great number of individually owned, but cooperatively operated drug stores, affiliated with McKesson & Robbins, Inc., wholesale dealer in drugs, toilet articles, and other goods, wares and merchandise, operating throughout the United States. That the drug stores so affiliated with McKesson & Robbins constitute what is commonly known as a "voluntary chain" of stores, but which would be more *porperly* designated as a "cooperative chain." That in 1928 said McKesson & Robbins, Inc., had up to that time merged fifteen wholesale druggists, who had contact [fol. 41] with fifty-five per cent (55%) of the independent or singly owned drug stores in the United States, and by its combined sales force, under direct control of a single organization, comprised one of the largest selling organizations in the world. That said McKesson & Robbins, Inc. were primarily manufacturers of drugs, whose laboratories and manufacturing plants are situated at Bridgeport, Conn., covering acres of ground. That in the handbook of the McKesson retail stores, distributed in 1931, at page 63, it is stated that McKesson & Robbins have now organized sixty-seven (67) wholesale distributors in the United States, whose business it is to serve the independent druggists of the nation. That the aforesaid manufacturer-wholesale-retailer combination is the production and distribution of drugs is the very personification of mass merchandising, and enables the individual single store owners affiliated therewith to sell merchandise at retail under the same terms and under the same conditions as those established by chain store systems and department stores. That in such McKesson retail drug stores the consumer can find in almost any neighborhood in the United

States drugs at the same price and as extensively advertised as in chain drug stores. That the wide distribution of wholesale establishments owned and/or controlled by McKesson & Robbins is shown by a map appearing — pages 66-67 of the 1931 handbook, copy of which map is hereto attached marked exhibit 1, and made a part hereof. That the emblem on said map with the words:

"McKesson Service, the Standard of Quality,"

is uniformly found displayed in front of every retail store affiliated with the McKesson & Robbins, Inc. That the [fol. 42] specific locations of the wholesale distributing points of McKesson & Robbins, Inc. throughout the United States are shown on pages 94 and 95 of the said handbook, copy of which pages are hereto attached, marked Exhibit 2, and made a part hereof. That according to said exhibit 2 said McKesson & Robbins, Inc. have four wholesale distributing points in the State of Florida, i. e., Jacksonville, Tampa, Miami and Orlando. That said McKesson system consists of an arrangement whereby the manufacturers, McKesson & Robbins, Inc. either purchase outright, or secure control of wholesale druggists in the different states, such as the Groover-Stewart Drug Company formerly was, and the wholesale druggist so acquired in turn affiliates with the retail druggists in the respective territories where such wholesale druggists have distributing warehouses. That the wholesale distributor at the several points (four in Florida as aforesaid), enter into contracts or arrangements with the owners and operators of singly owned drug stores whereby such single drug store owners agree to purchase from such distributor in the State of Florida, in that locality, all of the drugs, toilet articles, and other goods handled in drug stores, or such of them as may be carried and sold by the distributing warehouse, in consideration of which the distributor of the said McKesson system agrees to give to such drug store owner whatever benefit may arise from the volume resulting from his purchases combined with the purchases of all other retailers of drugs affiliated with said system. That such wholesale distributor also agrees to and does furnish to each such retail store owner the benefit of group advertising, including national radio advertising, and merchandising service supplied by and through said McKesson organization.

[fol. 43] That there are operated in the City of Jacksonville, Florida, 35 individually owned drug stores affiliated with the said McKesson System, who get their supplies through the warehouse of the McKesson-Groover-Stewart Drug Company, Jacksonville, Fla. and who receive the benefit of the buying service, advertising service, and other advantages aforesaid by virtue of affiliation with the McKesson Organization. That at Orlando, Tampa, Miami, and other points in the State of Florida, there are large number of other individually owned drug stores affiliated with the said McKesson system in the same way. That the total number of independent drug stores in the United States and elsewhere in like manner affiliated with said McKesson system, is 57,000. This fact was broadcasted to the world in a McKesson radio program on November 3, 1931. That all of such drug stores so affiliated with said system are competitors of the drug stores owned and operated by your orator Louis K. Liggett Company, in Florida and other States, as aforesaid. That the said McKesson retail stores are able to purchase merchandise substantially at the same prices and on the same terms as your orator. That the total sales made by individually owned retail stores affiliated with the said McKesson System in the State of Florida, as aforesaid, amount to a great many times the total sales of all of the 22 retail stores operated by your orator, Louis K. Liggett Company, in the State of Florida. That the individual- owned drug stores affiliated with the said McKesson System, as aforesaid, have all the advantages of quantity buying, and none of the disadvantages resulting from capital invested in quantity purchased, capital invested in warehouse, insurance, depreciation, etc. That such individually owned drug stores affiliated with said McKesson System can by motor vehicle procure quick deliveries on short orders, not only in the cities where said distributing warehouses are situated in Florida, but also for long distances around such [fol. 44] distributing points. That such individually owned stores affiliated with the McKesson System are able to keep their current stocks down to a small value because they can procure such goods in the State from the wholesale distributing point on 24 hours' notice; whereas it takes from three days to two weeks for Liggett's drug stores in the State of Florida to make requisitions and receive ship-

ments from the Company's central warehouse in New York City, thus necessitating the carrying in each of the retail units of your orator, Louis K. Liggett Company a comparatively larger stock than is carried by the individually owned drug store affiliated with the McKesson System, as aforesaid. That although the retail drug stores affiliated with the McKesson System, as aforesaid, enjoy all the alleged benefits of the chain or multiple store method of distribution, and avoid many of the burdens thereof, as aforesaid, nevertheless each of such individually owned drug stores affiliated with the McKesson System is required by sec. 8 of said Act to pay an arbitrary state license fee of only $5.00 each. That the said McKesson-Groover-Stewart Drug Company, although a wholesale chain drug company, operating at four points within the State of Florida, is not affected by said Act, and is required to pay only $1.50 per $1,000.00 on its stocks of merchandise, pursuant to sec. 926 Revised General Statutes of Florida, instead of $3.00 per $1,000.00 which your orator Winn & Lovett Grocery Company will be required to pay on its stocks of merchandise carried in its grocery warehouses, situated in Jacksonville and Sanford, Florida, as aforesaid. That the said McKesson & Robbins organization and affiliation of retail drug stores surrounding the four distributing points in Florida, as aforesaid, were in operation long before the 1931 sessions of the Florida Legislature, and the members [fol. 45] of the Legislature knew of such operations in the drug business, as well as in the other lines hereinafter mentioned. Nevertheless said Act deliberately undertakes to favor individually owned drug stores affiliated with such organizations, as aforesaid, and to impose oppressive, arbitrary and excessive burdens of taxation upon such merchants as your orator Louis K. Liggett Company simply and only because without subterfuge they own and operate a number of stores under one ownership and management.

X

Your orators would further show that the complainant Winn & Lovett Grocery Company operates each of its individual 38 grocery stores situated in various counties of the State of Florida as aforesaid, in the same manner that similar grocery stores are operated by owners of only one such

grocery store. That the manager of each such grocery store owned by this complainant buys a large part of his green vegetables, fruits, dairy products, poultry, eggs, etc. locally where such store is situated, from farmers and fruit growers, in the same way that single grocery store owners buy like merchandise. That the farmers and fruit growers, with the aid of State Market Bureau quotations, carried in Florida daily papers, always keep close watch on the market quotations, and, except for variation in quality, there is substantially no difference in the sale price to the local grocery stores, whether sold to a grocery store operated by a single-store owner, or to a grocery store owned by such operators as this complainant. That in all such cases the quotations put out daily by the Florida State Marketing Bureau is the basis of sale between the producer and the grocery store. That as to staple groceries, canned goods, butter, lard, meat—other than fresh meats—and the like, this complainant buys in comparatively large quantities and assembles [fol. 46] the same, by interstate shipments, at its principal warehouse located in the City of Jacksonville, and some at its branch warehouse located at Sanford, Florida, and from this points distributes those classes of merchandise to its individual retail stores on requisitions of such stores, as needed. That short distance deliveries are made by truck substantially in the same way as similar merchandise is delivered by the wholesale grocers operating in Jacksonville and other large cities of the State, to grocery stores owned and operated by single-store owners. That fresh meats, beef, pork, lamb and the like, are purchased and obtained by this complainant for its retail grocery stores in substantially the same way and from the same source as that utilized by grocery stores owned and operated by single-store owners.

That the aforesaid Act of 1931 was not designed as a police measure as applied to the grocery business conducted by this complainant in the manner aforesaid. That the operation by this complainant of many stores, as aforesaid, situated in different parts of the State of Florida, does not increase the fire hazards, or endanger the health or morals of the community, or require increased or additional police protection, any more than other stores individually owned and operated in said respective communities. That this complainant owns and operates one store in the City of Talla-

hassee, Florida, under the name of "Lovett's Groceteria," situated at 304 South Monroe Street. That there are a number of other grocery stores in the City of Tallahassee, Florida, none owned and operated by other so-called chain stores, and others individually owned, where the same character of merchandise is sold and substantially the same methods of business carried on, and yet, on account of the circumstance that this complainant owns many stores in [fol. 47] other parts of the State the tax imposed by said Act upon said single store owned by this complainant in the City of Tallahassee, as aforesaid, is many times the burden which is imposed upon the single grocery store owner, selling the same or a greater amount of merchandise, next door, or in the same block where this complainant's said business is carried on.

XI

Your orators would further show that there is very keen competition in the grocery business in the State of Florida, although many chain or multiple grocery store owners operate in the State. That there are in the City of Jacksonville, Florida, according to the classified telephone directory of August, 1931, to-wit, 388 retail grocery stores, and sixteen wholesale grocery stores. That a copy of said classified list showing the names and addresses of said 388 retail grocery stores is hereto attached, marked exhibit #3, and made a part hereof. That your orator Winn & Lovett Grocery Company owns and operates 4 Blitch's Red Front Stores, 4 Clarence Saunders Stores, 14 Piggly Wiggly Stores and 1 "Lovett's Groceteria" making 23 in all. That, as appears by said directory, there are in the City of Jacksonville, Florida 37 Whiddon Stores, owned by George C. Blume, as aforesaid. That Whiddon stores are a local system of chain stores operated only in Duval County. That the Great Atlantic & Pacific Tea Company operates 16 retail grocery stores in the City of Jacksonville, Florida. That as appears by said directory, Exhibit 3, there are numerous other small chains of grocery stores operating in the City of Jacksonville, most of them being local, and operating only within said City.

[fol. 48] Your orators would further show that the keenest of competition and the class of advertising put out, not only by chain grocery stores, but also by individually owned

grocery stores and by cooperative groups of individually owned grocery stores, are shown by the grocery store advertisements appearing in the Florida Times Union, published at Jacksonville, Florida, on September 12, 1931, pages 10 to 15, inclusive, which pages of said issue of said paper, so far as they concern grocery store advertisements, are hereto attached, marked exhibit #4, and made a part hereof. That the advertisement of your orator Winn & Lovett Grocery Company for its "Lovett's Groceteria" store appears page 10 of said exhibit. That the advertisement for its Piggly Wiggly stores, Clarence Saunders stores and Blitch Red Front Stores, appear page 11 of said issue of said paper. That the advertisement for the Great Atlantic & Pacific Tea Company's stores appears page 13 of the issue of said paper. That the advertisement of Whiddon's Stores appears page 16 of said issue of said paper. That the advertisement for the Daylight Markets appears page 14 of said issue of said paper, which markets consist of a local chain in Duval County, Florida, of three grocery stores. That the full page advertisement of "Better Food Stores" appears page 12 of said issue of said paper. That the 42 grocery retail stores listed on the margin of said advertisement for "Better Food Stores" are a group of individually owned grocery stores affiliated with Lewis-Chitty Consolidated Grocery Company, a wholesale grocer doing a large wholesale business in the City of Jacksonville, with branch wholesale houses at Orlando, Florida, Tampa, Florida, Cocoa, Florida, Miami, Florida, and other points in the State. That as appears by said advertisement, page 12 of said exhibit 4, the slogan of the "Better Food Stores" is—

[fol. 49] "Individually Owned, Operated Collectively—Your Neighborhood Grocery Stores."

That the name "Better Food Stores" is a trade name belonging to a Corporation whose corporate name is "Better Food Stores, Inc." organized under the laws of the State of Florida, charter of which was granted June 8, 1921. That the organizers of said "Better Food Stores, Inc." were A. B. Chitty, C. B. McDowell, John W. Martin and L. W. Jennings, all of Jacksonville, Florida. That the said A. B. Chitty is the President and controlling stockholder of the Lewis-Chitty Consolidated Grocery Company, and the said John W. Martin is a former Governor of the State of Flor-

ida. That the said Act known as Committee Substitute for House Bill No. 8-X as passed, is substantially the same bill which was introduced in the Senate during the regular session of the 1931 Legislature, so that the formation of such cooperative groups as represented by said "Better Food Stores" has been encouraged and fostered by the discriminations created by said Act. That on June 18, 1931, another grocery corporation was organized under the name of "Florida Food Stores, Inc." by certain individuals in the grocery business at Daytona Beach, Florida, and under that name a number of independent or individually owned grocery stores have been affiliated for cooperative purposes, in the same way as the aforesaid group operating under the name of "Better Food Stores." And in like manner many other cooperative groups of independently owned grocery stores have been formed under trade names, or otherwise, since the passage of said Act, being assured thereby that they could so operate without being subjected to the excessive and discriminatory graduated license fees provided for by said Act. That although the said "Better Food Stores" group was organized about the time said Act was [fol. 50] passed or introduced into the Legislature, the same has had a very rapid growth, as shown by said advertisement, there being on September 12, 1931, forty-two (42) individually owned grocery stores in said Jacksonville or Duval County group. That other similar groups have been formed at Orlando and vicinity, Tampa and vicinity, Cocoa and vicinity, Miami and vicinity, where the said Lewis-Chitty Consolidated Grocery Company has Branches of its wholesale grocery business. That your orators have not been able to obtain a copy of the contract existing between the individually owned grocery stores and said corporation known as "Better Food Stores, Inc." or between the said individually owned grocery stores and the Lewis-Chitty Consolidated Grocery Company, but your orators are advised and believe, and so aver, that the contract whereby individually owned grocery stores have been affiliated under that trade name is similar to a contract which began to be used three or four years ago in Jacksonville, Florida, and vicinity, by another wholesale grocery company, under which individually owned grocery stores were affiliated under the trade name of "Clover Farm Stores." That in and by said contract the owner of the individual store agreed, among other

things, to buy a share of stock in The Clover Farms Stores Company, similar to Better Food Stores, Inc. and to use such painting and such signs as would indicate that the individual store belonged to said group. That during the life of said contract the individual store owner would, as far as possible, purchase his requirements in dry groceries from a particular wholesale grocerman, in this case the Lewis-Chitty Consolidated Grocery Company, or if not, from the authorized packers, manufacturers or wholesalers designated by the Clover Farms Sales Company, in this case The Better Food Stores, Inc.; also that the individual store owner agreed to pay so much per week for the benefits de- [fol. 51] rived under the contract. In return for all of which the individual retail store owner was to receive the advantages of cooperative purchasing and advertising privileges, modern merchandising methods, advice and instructions in modern store stock arrangement, etc., and the Company, that is to say the intermediary between the retail store owner and the wholesale Company—in this instance the Better Food Stores, Inc.—agreed to suggest plans and layout of shelving and fixtures according to modern merchandising standards, and to give the individual store owner such advice as would enable him to conform to the general plan for the operation of all such group of stores. Also that the Company should at its own expense furnish a representative to advise with the individual store owner as to merchandising methods, acting in the capacity of supervisor, and to give instructions and to furnish certain defined services; all of which are more particularly shown by a copy of said Clover Farm Stores form of contract hereto attached, marked exhibit #5, and made a part hereof. That your orators are further advised and believe and so allege that the contract entered into between said individually owned store owners as aforesaid, provided that said individual store owners would purchase, carry and sell the particular brands of package goods carried by the Lewis-Chitty Consolidated Company, particularly "Over Sea" Brands carried by said Company, and appearing in said advertisement, page 12 of said exhibit #4. That by such affiliations and cooperative organizations single grocery store owners have adopted the best features of chain store merchandising and have secured substantially all the benefits derived therefrom, while at the same time they have avoided the burdens

of capital investment, insurance, etc. incident to the carrying of a large stock in a central warehouse, such as maintained by your orator Winn & Lovett Grocery Company, in [fol. 52] Jacksonville, Florida and Sanford, Florida. That your orator Winn & Lovett Grocery Company also finds it necessary to maintain a force of employe-s in a fleet of trucks to deliver merchandise from its warehouse in Jacksonville, Florida, to its retail units, operated in Duval County, Florida, and outlying small towns; whereas the individually owned stores affiliated as "Better Food Stores," as aforesaid, have no such expense, and can obtain daily deliveries by motor trucks as needed, from the Lewis-Chitty Consolidated Grocery Company, with which they are under contract, as aforesaid.

Your orators would further show that cooperative groups such as the aforesaid "Better Food Stores" are not local merely to Jacksonville, Florida, and other parts of Florida, as aforesaid, but that method of cooperative merchandising prevails generally throughout the United States. That the largest organization of independently owned grocery stores in the United States is known as the Independent Grocers' Alliance, which was formed 5 years ago in Poughkeepsie, New York. That said organization of independently owned grocery stores now embraces thirty-eight states, including the Southern States, and has one hundred and thirty (130) jobbing or supply depot centers. That in the course of five years said organization of independently owned grocers has acquired a buying power of $500,000,000.00 per year, serving approximately 11,226,000 families, through more than 14,000 retail grocery stores. That the scheme of organization and affiliation of the Independent Grocers' Alliance and the owners of individual grocery stores is very similar to the relation which exists between the members of the Better Food Stores aforesaid, and the Lewis-Chitty Consolidated [fol. 53] Grocery Company, or its intermediary Better Food Stores, Inc. That the retail grocer affiliated with the Independent Grocers' Alliance pays $3.50 per week to the Independent Grocers' Alliance jobber, who in turn furnished the retailer with groceries at reduced prices, and also newspaper advertising, copy mats, display cards, price posters, and various up-to-the minute merchandising helps. That the newspaper advertising is placed by the I. G. A.

wholesaler in his local paper, but the copy and layouts are furnished by the I. G. A. advertising counsel. That the I. G. A. advertising appears in 283 dailies and 454 weeklies, and calls for an annual expenditure of $757,000, in addition to which there is an annual expenditure of $250,000.00 for national magazine and radio advertising. That the selling power of the I. G. A. Organization is very great, as illustrated by the following figures taken from a recent publication:

"During the past year, within a period of one or two weeks I. G. A. stores have sold 65 carloads of matches, 500 carloads of salt, 100 carloads of toilet paper, 120 carloads of sliced peaches, 150 carloads of macaroni, 4,600,000 pounds of Christmas candy."

That at the present time there are more than 500 I. G. A. Brand items sold by members of the I. G. A. stores. That there are in Florida affiliated with the Independent Grocers' Alliance 83 retail grocery stores in Tampa, St. Petersburg, Clearwater, and on the West Coast of the Peninsula, who get their supplies from Perkins & Sharpe, whose warehouse is situated in Tampa, Florida, and who are the I. G. A. jobbers in that territory. That in the Tampa Morning Tribune of Oct. 24, 1931, there appeared an advertisement by the Tampa Grocery Company, of Tampa, Fla. which is one of the I. G. A. stores in that vicinity. That a copy of said advertisement is hereto attached, marked exhibit #6, and made a part hereof, from which it appears that each of said stores carries an insignia of a shield with the letters [fol. 54] "I. G. A." appearing thereon; and said stores also carry the slogan "Home Owned." Also that the goods advertised are for the most part I. G. A. Brands. That on October 16, 1931, a similar advertisement appeared in the Clearwater Sun by other I. G. A. stores, a copy of which said advertisement is hereto attached, marked exhibit #7, and made a part hereof. That there are many other voluntary chains or cooperative groups in the United States, not only in the grocery business, but in other lines, and the independent store owners so operating have adopted the best features of modern merchandising promulgated by chain or multiple store operators. Some of the methods in which regular chain stores took the lead, and which were then

adopted by single store merchants, voluntary chains or co-operative groups, are as follows:

"Buying.—Regular chains first bargained to reduce the margin of the wholesaler to a minimum and then established their own wholesale service.

"Voluntary chains first sought to reduce the wholesaler's margin to the lowest possible basis by group or concentrated buying. They are now developing a form of voluntary association between the wholesale supply center and the retail outlets which is planned to avoid salesmanship, credits and other executive functions so that the wholesale house will do the work of central buying, warehousing and delivering at a cost closely approximating that of the same functions in the regular chains.

"Management of Stores.—Regular chains improved their operations by more attractive stores, better arrangement of stocks, dropping of duplicate lines, and the introduction of careful business methods to avoid as much as possible of the waste in distribution.

Voluntary chains are altering their stores to some more or less uniform appearance; are adopting certain standards of cleanliness and arrangement; and are educating their members to the overhead burden which must be borne if their is needless duplicating of lines.

"Central supervision.—Regular chains early developed standardized operations with systematic supervision.

"Voluntary chains started with group meetings to secure community of action and are now progressing into the use of newspaper copy featuring prices; now they are continuing to offer prices which will interest the shoppers but are mak- [fol. 55] ing increased use of institutional copy to individualize the service of their stores and certain types of commodities offered only by themselves.

"Voluntary chains first offered local specials to match the chain store across the street; then organized into larger groups because a number of stores had to participate if newspaper copy was to be used; and now are progressing into more systematic use of "specials and greater emphasis upon the importance of individual ownership and the lines which the independents feature.

"Special Deals with Manufacturers.—Regular chains naturally asked the manufacturer to make them an allowance in lieu of the money he was using to place his brands in retail stores, and suggested that a portion of his advertising appropriation be spent in their space because of the direct contact established with the consumers.

"Voluntary chains are putting forth much effort to impress their numbers with the importance of implicit acceptance of the group program so as to offer the manufacturer the same store replacement and selling service that he could get from the regular chains. They have been aided in this difficult problem in organization by securing appropriations for their newspaper advertising and window spaces along the same lines as the appropriations secured by the regular chains.

"Private Labels—Regular chains have developed private labels for the purpose of giving individuality to their merchandise and to provide lines on which they were not exposed to direct price competition.

"Voluntary chains are developing private labels to help promote group loyalty, as well as for the same merchandising reasons that have prompted the regular chains."

That although members of such voluntary chains or cooperative groups are doing business in the same way, and doing the same kind of business, and have adopted the same features of merchandising first promulgated by chain store operators, the said Act of which your orators complain undertakes to impose excessive burdens of State license taxes provided for by the brackets 1 to 11, inclusive, of sec. 5 of said Act, upon your orators and other chain store operators similarly situated, while not placing the same corresponding burdens upon members of said volun-[fol. 56] tary chains or cooperative groups. That the Legislature knew that the Independent Grocers' Alliance was operating extensively in Florida before said Act was passed, and the Legislature also knew that your orators were already operating their several drug, grocery and shoe stores in Florida, and had been for some years prior to the passage of said Act. That the said Act in view of the comparisons aforesaid, and many others which your orators can and will show to the Court, is a deliberate attempt to destroy the businesses of your orators, and of

other chain store operators similarly situated, by excessive taxation, and to compel them to disintegrate their several businesses and confine their operations to one store in one locality only; and your orators aver that the effect and operation of said Act violates the "Equal rights" clause and the "Equal protection" clause of sections 1, 4 and 12 of the Florida Declaration of Rights, and the Fourteenth Amendment to the Federal Constitution.

XII

Your orators would further show that your orator Paxson's Inc. was organized 1929 under the laws of the State of Florida, with a capital stock of $40,000.00, consisting of 400 shares of the par value of $100.00 each, owned as follows:

R. H. Paxson, President, residing at Jacksonville, Florida	201 shares
S. Spalding Smith, Vice President, residing at Gainesville, Florida	99 shares
C. B. Decker, Secretary-Treasurer, residing at Jacksonville, Florida	20 shares.

[fol. 57] That the officers and stockholders of this complainant, as aforesaid, are all long time residents and citizens of the State of Florida. That this complainant, President, was formerly employed for many years in a wholesale shoe store in Jacksonville, Florida, and while so employed, conceived the idea of owning and operating a number of comparatively small retail shoe stores distributed in different towns, to handle popular priced shoes, which would meet a popular demand of the trade. That the eight retail shoe stores owned by this complaina-t, one in Georgia and seven in Florida, as aforesaid, are the outgrowth of the plan so formulated. That this complainant conducts its shoe business in its several retail shoe stores situated as aforesaid, in the same manner as other shoe stores are conducted in said several localities, attempting, however, to give the public a better service than is given by other shoe merchants doing the same sort of business, and attempting to give the customers of this complainant better values for their money, all of which efforts on the part of this complainant are mere matters of competitive merchandising, equally

available to all other shoe merchants, whether owning only one store or many stores.

Your orators further show that your orator, Paxson's, Inc. carries a comparatively small stock of goods in each of its seven Florida stores, and a comparatively small stock of goods in its one Georgia Store. That your complainant, Paxson's, Inc. does not own or maintain any warehouse, central or otherwise. On the contrary, this complainant buys its goods direct from the factories, situated in different parts [fol. 58] of the United States, from which factories shipments are made direct to each individual shoe store owned by this complainant, as aforesaid. That this complainant buys shoes on substantially the same terms as shoes are bought by other shoe merchants doing business in different parts of the State, whether such merchants operate single stores or many stores. That this complainant does not do extensive advertising in connection with its said shoe business due to the fact that its said shoe stores are widely scattered, and advertising in one town where a store is located would be of little value in another town which has its own local papers. That this complainant's shoe business in each town where a store or stores are operated has been built up by the energy and effort of this complainant's officers and by the efforts of complainant's store managers, some of whom own stock in the Company, as aforesaid.

Your orators would further show that the complainant, Paxson's, Inc. has many competitors doing a similar shoe business in the Cities of Jacksonville, Florida, Gainesville, Florida, Daytona Beach, Florida, and West Palm Beach, Florida, where Paxson's, Inc. operate stores as aforesaid. That in Jacksonville, Florida, there are many shoe stores which are singly owned and operated. That in said City there are shoe businesses operated in more than one location, among which is J. J. Jordan, who owns and operates three shoe stores in the City of Jacksonville, but in no other County. And your Orator further shows that the Department Store, known as Cohens, operated in the City of Jacksonville, Florida, as aforesaid, has two or three shoe departments for different grades of shoes. That the value of the combined stocks of shoes in the several departments of the said Cohen's Department Store is greater in value than the combined value of all of the stocks of this com-

[fol. 59] plainant's seven Florida shoe stores, situated as aforesaid. Nevertheless, said department stores, covering a whole City block in the City of Jacksonville, and embracing under one roof many departments of merchandise, including several shoe departments, as aforesaid, will be assessed with an arbitrary state license fee of only $5.00; whereas this complainant will be assessed with an arbitrary state license fee in the sum of $13.60 on each of its said shoe stores, in addition to which this complainant will be required to pay $3.00 per $1,000.00 license tax on the value of its merchandise carried in its several stores situated as aforesaid, plus a county license tax of 25% of the State tax, plus a municipal license tax of another 25% of the State tax. That there are several other singly owned shoe stores in the City of Jacksonville who each carry a larger stock, and who each do a larger retail business than this complainant does in all of its three shoe stores located in said City. Nevertheless, said large single shoe stores are chargeable with annual state license fees of only $5.00 each, as compared with an annual state license fee chargeable against each of this complaint's shoe stores of $13.60. That this complainant's said shoe business through said seven Florida retail stores has been in operation for several years last past. That many other shoe businesses are now, and were prior to the passage of said Chap. 15624, operated in a similar manner. That the drug business of the Louis K. Liggett Company and the grocery business of the Winn & Lovett Grocery Company, were also operated in the same manner as now long before the passage of said Act.

[fol. 60] XIV

Your orators would further show that whatever success has been attained by your orators and other chain or multiple store merchants, has not been due to the adoption of any operating methods peculiar to themselves, or other chain store merchants, unavailable to other retailing instrumentalities. That chain or multiple store operators have simply adopted their distributive policies and methods to satisfy the requirements of the changed economic conditions, some of which are set forth in sec. VI of this Bill, and have led the way towards the elimination of waste and

duplication in retail distribution, with resultant benefits to the consumers of better merchandise at lower prices. That chain or multiple stores have many operating methods in common, but all of them are open to adoption by singly owned stores. That as regards quantity buying, buying for cash, skill in buying, warehousing, sales policy, management or methods—all such practices and improvements in retail merchandising are open to all merchants, and have been adopted by many progressive independents, either as individuals, or by cooperative groups such as McKesson & Robbins Drug Stores, Better Food Stores, and I. G. A. Grocery Stores, as hereinbefore set forth.

Your orators would further show that in March, 1929, the State of Indiana passed an anti-chain store act, sections 1, 3, 7 and 9 of which, save the officers named to administer the law, were copied almost word for word in the corresponding sections of the Florida Act, Chap. 15624. That the Indiana Statute in full appears in the foot notes of the decision of

> [fol. 61] Jackson v. State Board of Tax Commissioners, 38 Fed. (2) pages 653 to 655.

That the brackets contained in sec. 5 of said Indiana Statute were copied almost word for word in said Committee Substitute for House Bill No. 8-X, as appears from the report of the Senate Committee on Finance and Taxation, contained in the Senate Journal of June 23, 1931, pages 2 and 3, save that the brackets in said Bill as introduced named a maximum of $50.00 for each additional store, instead of $25.00, as in the Indiana Statute. But, as previously pointed out in sec. 4 of this Bill, the Senate amended said House Bill by substituting an entirely different set of brackets, as now appears in sec. 5 of said Act, and said Senate amendments were afterwards adopted in the House, but not by a two-thirds vote. That the sundry matters complained of in sec. 7 of this Bill are each and every entirely different from the provisions of said Indiana Statute. That said Indiana Statute by a five to four decision, was sustained by the Supreme Court of the United States, and said decision, rendered May 18, 1931, is reported as

> State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 75 L. ed. (Adv.) 670, 51 S. Ct. 540.

That the majority opinion delivered by Mr. Justice Roberts recites that the appellants introduced evidence to prove that there are many points of difference between chain stores and independently owned units, following which the supposed differences are stated in the majority opinion. That the record in said cause, and the dissenting opinion of Mr. Justice Sutherland show that said recital of the majority opinion was predicated upon the testimony of one William A. Rawls, Dean of the School of Commerce and Finance, University of Indiana, who, by his testimony [fol. 62] claimed to be familiar with merchandising conditions in that State; whereas Mr. Justice Sutherland points out in his dissenting opinion that said witness on cross-examination himself admitted that no such differences existed. That the record in said cause also contains the testimony of other nationally known experts, among them P. H. Nystrom, Professor of Marketing, in Columbia University, and the author of sundry books on the subject of retail merchandising, chain stores, and the like. That the testimony as given by the said Nystrom also contradicts the testimony in chief given by said Rawls. That all the testimony taken in said cause was given early in January, 1930, as applied to conditions then existing in the State of Indiana. That regardless of what may or may not have been the conditions of merchandising and the then methods used by chain stores operators in the State of Indiana, such conditions and such differences as catalogued by the majority opinion of the Supreme Court do not prevail in Florida. That as to each of the alleged differences mentioned by the majority opinion in the Jackson case, the following is the situation now prevailing in Florida:

(a) As to—

"Quantity buying which involves the operation of the mass process to distribution comparable to the mass method used in production."

That in Florida the amount or quantity of merchandise which can be procured by any merchant is in no wise dependent upon the number of stores owned by such merchant, but upon the size of the business conducted and the volume of the business done by such merchant, whether such merchant owns one or more stores, plus the capital or

credit standing of such merchant. That many merchants [fol. 63] owning one store in Florida can and do buy the merchandise sold by them in the same or larger quantities than so-called chain stores, or merchants owning more than one store; as, for example, the buying of merchandise by Cohen Brothers, the large department store in Jacksonville, hereinbefore mentioned. That quantity buying is merely a cost factor in the purchase and distribution of merchandise, and many merchants in Florida who own only one store, can and do secure their merchandise at equally as favorable prices as so-called chain stores, or merchants owning more than one store. That in the drug business, and in the grocery business, and in many other businesses, the articles sold by the merchants in Florida are packaged and branded goods, nationally advertised, and sold under the trademarks of the manufacturers, and the quantities necessary to be purchased in order to secure the best quantity discounts are small or moderate, so that the best quantity discounts can be obtained by business of small or moderate volume. That the shoe business of your orator, Paxson's Inc. and the shoe businesses conducted by his numerous competitors, as aforesaid, all illustrate the fact that there is no advantage in quantity buying available to chain stores which is not likewise available to all merchants doing business in this State, and this fact is also further illustrated by the operations of cooperative groups such as McKesson Drug Stores. Better Food Stores, and I. G. A. stores, whose operations are explained as aforesaid.

(b) As to—

"Mass Distribution."

Your orators would further show that there is no such [fol. 64] thing as mass distribution in the same sense as mass production. That in the case of mass production, the same is accomplished by machines made for that purpose, operated in factories, with one set of expenses for rent, light and other overhead factors. That the articles so turned out must afterwards be individually distributed to individual customers, through retail outlets, each having its own set of overhead expenses, and in the case of a merchant having 58 stores, there are overhead expenses of 58 store organizations, 58 sets of sales people, 58 sets of rents,

58 insurance policies, and 116 assessments of ad valorem taxes, and the articles made by the machines in mass must be sent to the individual stores and then distributed, unit by unit, to individual customers. That the term "mass distribution" is paradoxical, and merchants have not found, and do not have any method of distributing merchandise in mass. That if by "mass distribution" it meant large aggregate sales of chain stores, then the many large department stores doing business in Florida have a greater "mass distribution" than many ch-in stores doing business in this state, and in like manner, the aggregate retail sales of such cooperative groups and Better Food Stores and I. G. A. Stores are very much greater than the aggregate sales of many chain stores operating in the State of Florida.

(c) As to—

"buying for cash and obtaining advantage of a cash discount."

That in Florida buying for cash and obtaining the advantage of a cash discount has no relation whatever to the number of stores owned, but is a matter of individual judgment, and of buying terms and of cash capital. That many individual merchants in Florida owning one store buy for cash and obtain the benefit discounts, whereas there are so-[fol. 65] called chain stores, and merchants who own more than one store, who do not pay cash, and who do not take advantage of the cash discounts. This is particularly true of chain furniture stores, chain ready-to-wear stores, and chain automobile accessories stores. That the chain furniture business, buying on credit and selling on credit, is illustrated by the affidavit of C. D. Wood, filed in this cause on the 19th day of October, 1931.

(d) As to—

"Skill in buying so as not to overbuy and at the same time keep the store stocked with merchandise, suitable in style, quality and quantity for the neighborhood customers who patronize them."

That in Florida there are many individual merchants who are extremely shrewd and skillful buyers, and there are

merchants owning more than one store who are not skillful buyers. That the ability or necessity of employing a special buyer is dependent on the size of the business done and not on the number of stores owned. That skillfulness in buying is a personal attribute of the merchant owning the store, and has no relation to the matter of whether he owns one store or more than one store. That on the question of keeping stores stocked with merchandise suitable for the neighborhood customers the one store merchant has the same or better opportunity than the chain store merchant, who must operate his business through the employment of store managers. That the individual merchant owning a single store has a great advantage in the matter of good will and in the matter of contact with his trade.

(e) As to—

"Warehousing of goods and distributing from a single warehouse to numerous stores."

[fol. 66] That in Florida there is no such advantage. That in Florida warehousing is done merely as a matter of convenience in order to supply the stores owned with merchandise, and the maintenance of a warehouse, with the incident rent, taxes, insurance, etc. is an expense, and not an advantage. That many merchants who own more than one store in Florida, such as the complainant, Paxson's, Inc., do not own or operate any warehouse whatsoever, and do not distribute from a single warehouse to numerous stores. That whether the individual merchant, be he a single store merchant or a chain store merchant, owns and maintains a warehouse depends upon his individual needs and the individual judgment of the particular merchant, but whatever benefit or burden is incident to the maintenance of a warehouse is open to all alike.

(f) As to—

"Abundant supply of capital whereby advantage may be taken of opportunity for establishment of new units."

That in Florida there are many merchants who own only one store who have abundant supply of capital whereby advantage can be taken in enlarging the business of such merchants; that there are many merchants owning more

than one store who do not have such supply of capital. That during the period from 1922 to 1929 capital was easily available to all merchants of good credit standing, whether owning one store or more than one store. That at the present time all merchants are finding great difficulty in securing capital to enlarge their businesses, or to even keep their businesses intact, and this applies not only to single store merchants, but also to chain store merchants. That the amount of capital which a merchant doing business in [fol. 67] Florida can command depends upon his or its personal standing, ability, past and present prosperity, and other factors which are not in any wise related to the question of whether he owns one or more than one store. That in recent months there have been numerous failures of chain stores operators in the State of Florida, as well as numerous failures of owners of single stores; that among the chain store operators so failing in Florida, are Ethre Drug Stores, The All American Stores, and the Southern Grocery Stores.

(g) As to—

"A pricing and sales policy different from that of the individual store, involving slightly lower prices."

That in Florida many merchants owning more than one store do not have any pricing or sales policy different from that of the individual store, which is again illustrated by the manner in which your orator, Paxson's Inc. conducts its shoe business, as aforesaid. That in Florida merchants owning individual stores, as well as merchants owning more than one store, endeavor to do as large a volume of business as possible on as low a margin of profit as is consistent with covering the overhead expenses and earning a return on the invested capital. That in Florida some merchants sell for cash and some for credit; some deliver and some do not; and in Florida these factors are not dependent upon whether one or more than one store is owned by the merchant. That some merchants in exclusive or high priced rent sections, and catering to a high priced trade, are able to get better prices than merchants located in other sections, and doing business with a different class of people —but this has nothing to do with whether one store is [fol. 68] owned or many stores are owned. That the price

and sales policy of any store is a matter for the individual judgment of the owner, as to how to secure a return on the capital and effort invested. That the sales policies are illustrated in this cause by the advertisements aforesaid on the part of the Atlantic & Pacific Tea Company stores; on the part of Winn & Lovett Grocery Company for its stores; on the part of Whiddon's stores; on the part of the Better Food Stores; on the part of the I. G. A. stores, all of whom are free to utilize, and are attempting to utilize those features which in their several judgments will be most effective to attract trade.

(h) As to—

"A greater turn over and constant analysis of the turn over to ascertain relative profits on varying items."

That in Florida turnover is a mere matter of volume of business done, and is related to the class of merchandise sold, and not to the matter of whether one or more than one store is owned; that in the jewelry business and in the furniture business, and hardware business, and other businesses, the turnover is comparatively slow, while in the restaurant business and confectionery business the turn over is rapid. That many individual merchants have as rapid turnover as merchants owning more than one store, and there is nothing inherent in the ownership of two or more stores which gives the merchant a greater turnover than that of a merchant owning only one store. That constant analysis of the turn-over has no relation to the question of whether one store or more than one store is owned, but is a matter of individual energy, temperament and [fol. 69] attention to details. That through such cooperative groups as the McKesson Drug Stores, Better Food Stores and I. G. A. Stores, individual merchants who so affiliated are able to obtain even greater or more rapid turnover than can be had in the retail units of chain store merchants who, as for instance your orator, Louis K. Liggett Company, are compelled to make shipments from a distant warehouse on requisitions receive-, whereas the numbers of such cooperative groups can get deliveries by truck from local distributing warehouses on short notice.

(i) That as to—

"Unified and therefore cheaper and better advertising for the entire chain in a given locality."

In Florida many so-called chain store merchants do not advertise at all in newspapers, and others advertise infrequently as for instance, your orator Paxson's, Inc. and as for further example, the Independent Furniture Company, whose business is explained in the affidavit of G. D. Wood which was filed in this cause on October 19, 1931. That many so-called chain store merchants have only one store in this state and for that reason are on the same footing as regards advertising as the individual single store merchant. That Montgomery Ward & Company, formerly and still a large mail-order house, and recently operating several hundred stores in many states, owns only one store in Florida. That Sears, Roebuck & Company, formerly and still another great mail order house, also now operates several hundred stores in different parts of the United States, with several in Florida, one at Jacksonville, one at Tampa, one at Miami; but being so widely distributed, advertisement in the newspapers of one of such stores is of no practical benefit to the stores situated in [fol. 70] other cities. That whatever advantages there may be in unified advertising is open to all, and has been adopted and is being utilized by such cooperative groups as Better Food Stores and I. G. A. Stores, as more particularly shown by the advertisements hereinabove referred to, or attached to this bill as exhibits.

(j) As to—

"Standard forms of display for the promotion of sales."

Many merchants in Florida owning more than one store do not have any standard forms of display, but each store manager uses such displays as the individual store manager thinks will attract customers to his locality. That many merchants owning one store only use the same methods and same forms of display as merchants owning more than one store. That forms of display are shown in trade magazines and furnished by manufacturers, and are available to cooperative groups such as Independent Grocers' Alliance, Pure Food Stores, Inc. and others. That chain store merchants in this behalf, as in others, have led the way,

with the result that there has been a great imp*or*vement not only in the display of goods, but in the sanitation and cleanliness with which all first class retail stores are now operated.

(k) As to—

"Superior Management and Method."

That in Florida while there are merchants owning more than one store who may have "superior management and method", there are also merchants owning only one store who have "superior management and method," and there are merchants owning more than one store who have inferior management and method the same as there are mer- [fol. 71] chants owning one store who have inferior management and methods. That there is nothing inherent in the ownership of more than one store which produces "superior management or method." That in Florida merchants owning more than one store are subject to exactly the same economic conditions, problems and vicissitudes as merchants owning only one store. That chain store merchants have no monopoly on management or method, and no exclusive privilege in either behalf, save as acquired in some instances from corporations who have secured patent rights for particular types of store arrangement. That the Piggly Wiggly Corporation has patented the characteristic self service type of store uniformly found in Piggly Wiggly stores, and transfers and assigns to purchasers exclusive rights to use that sort of store arrangement in particular territory. That your orator, Winn & Lovett Grocery Company, secured such territorial rights in Duval County, Florida, and certain other parts of the State. That a certain merchant of Tallahassee, Florida, in like manner acquired the territorial rights in that locality, and now operates two Piggly Wiggly stores in Tallahassee. That the Piggly Wiggly corporation, in connection with the assignment of such rights, whether to a chain store, or the *the* owner of a single store, also supplies certain supervisory benefits and advices as to modern and up-to-date methods of merchandising. That in like manner the Claurence Saunders Inc. grant territori*la* rights to the particular design of store arrangement patented by that corporation and your orator Winn & Lovett Grocery

Company has obtained certain territorial rights in that behalf. That any other merchant, though owning a single store, has the same right to obtain such territorial rights from either said corporations, where not already assigned [fol. 72] and disposed of.

(l) As to—

"Concentration of management in the special line of goods handled by the chains."

Many so-called chain stores in Florida are not specialty shops, and do not handle one special line of goods, from which it follows that they have no advantage over single store merchants due to concentration of management in a special line of goods. That the J. C. Penney Company, a so-called chain, operates a department store; that Montgomery, Ward & Company, Sears Roebuck & Company and W. T. Grant also operate department stores, or stores of diversified merchandise. That Woolworth Company, Kress Company and McCrory Company operate 5 and 10 Cent stores, carrying innumerable classes of articles, and so do many other so-called chains. That the Florida stores of your orator Louis K. Liggett Company carries more than 11,000 different items, and your orator's said stores compete with such specialty shops as cigar stores, confectionery stores, perfume shops, and others, some of which are owned by merchants having only one store and some by merchants having more than one store. That merchants owning only one store have the same opportunity for concentrating management on the special line of goods handled by each such merchant as does the merchant owning two or more stores.

(m) As to—

"special Accounting Methods."

There are no methods of accounting peculiar to ownership of more than one store which are not available to owners of more than one store. That a store owner, whether owning one or several, may use such accounting methods as he sees fit. That the methods adopted or best [fol. 73] used are not dependent upon the number of stores owned, but rather, on the size of the business, the kind of

merchandise sold, whether on cash, credit or installment, and other varying factors, all of which are present whether the merchant is efficient or inefficient in conducting his business.

(n) As to—

"Standardization of store management, sales policies and goods sold."

Many Florida merchants owning more than one store do not standardize store management, sales policies or goods sold, while many merchants owning only one store do adopt such standardization. There is in fact such similarity in methods used and goods sold by merchants in Florida, such as drug merchants and grocery merchants. The store of one merchant cannot be distinguished inside or outside from the stores of other merchants, save by some peculiar painting or display of signs. That in any event, chain or multiple store operators have obtained no advantage from standarization which is not equally available to all store operators, and whatever improvements in that behalf have been made by chain stores in merchandising methods have been and are being adopted by other merchants, particularly such cooperative groups as McKesson Drug Stores, Better Food Stores and I. G. A. Stores, whose operations are illustrated by the advertisements above referred to.

(o) As to—

"Differences or advantages" shown by the "number of chains established or their growth."

That during the period immediately following the World [fol. 74] War the United States became a creditor nation, and large capital was available for business expansion; that a large number of stores were opened, not only by single store merchants, but also by multiple store merchants. That the rate of growth in number of singly owned stores was substantially the same as that of so-called chain stores; that all classes of stores increased in volume and prosperity during the period from 1922 to 1927. That in Florida the number of singly owned stores greatly exceeds, and has always greatly exceeded the number of ch-in or multiple stores. That the so-called chain store operators

which have been most successful have operated over long periods of time, dating back 25 to 72 years, and the strength and efficiency which such chains have acquired is the result of the accumulated experience of many years merchandising. That of the chain stores started since the World War there have been many failures, not only in Florida, but elsewhere, and the same is true of singly owned stores. That there is nothing inherent in the ownership of more than one store which saves it from lack of efficiency and capital backing any more than is in the ownership and operation of a single store.

That when all is said and done by way of comparing the businesses of chain or multiple store merchants with the businesses of merchants owning single stores only, there are no essential differences dependent upon whether one or more than one store is owned and operated. That the arbitrary, oppressive and unreasonable classifications attempted by said Chap. 15624, predicated upon the number of stores owned, are wholly without justification, and cannot be sustained consistent with the "due process" clause [fol. 75] and "equal protection of the laws" clause of sections 1, 4 and 12 of the Florida Declaration of Rights and the Fourteenth Amendment to the Federal Constitution.

[fol. 76] XV

Your orators would further show that the defendant Hon. Ernest Amos, under the advice of the Hon. Cary D. Landis, Attorney General of the State of Florida, is undertaking to administer said Chapter 15624 in a manner so as to create sundry exemptions and exceptions as to merchants to whom it shall be applied, which exemptions and exceptions, as your orators are advised and believed and so aver, are wholly unwarranted and deprive your orators severally of the equal protection of the laws contrary to sections 1, 4 and 12 of the Florida Declaration of Rights and contrary to the fourteenth amendment to the Federal Constitution.

That under date of October 27th, 1931, the defendant, the said Hon. Ernest Amos, Comptroller, addressed the following communication to all and singular the tax collectors of the several counties of the State of Florida:

"Tallahassee, Florida, October 27, 1931.

To the Tax Collector addressed,

DEAR SIR: Chapter 15624, laws of Florida covering occupational license taxes on retail stores repealed only that part of Section 1197 (926) compiled general laws of 1927 which relates to retail stores and left the provisions for license taxes to be paid on wholesale stores in full force and effect.

Section 1149 places a State license tax on the capital stock covered in each place of business, thereby making it necessary for the tax collector to collect the State license taxes from each separate furniture store and in addition thereto to collect a county license tax.

Yours truly, Ernest Amos, Comptroller."

[fol. 77] That the meaning of paragraph 1 of said communication is that wholesale grocery concerns as Louis Chitty Consolidated Grocery Company operating in Jacksonville, Florida, and others as hereinbefore set forth, will continue to be subject to section 1197 Compiled General Laws of 1927, paying only $1.50 per thousand on its merchandise carried, instead of $3.00 per thousand as is charged to your orators Winn & Lovett Grocery Company upon merchandise carried in its warehouse pursuant to all the provisions of sections 2 and 5 of said chapter 15624.

That the meaning of the second paragraph of said communication is that said Comptroller acting under the advice of the Attorney General construes said Chapter 15624 to be wholly inapplicable to furniture dealers, regardless of whether they operate one retail store or many retail stores, and the basis of that construction appears to be on account of the fact that section 1149 Compiled General Laws provides a special graduated license tax upon furniture dealers dependent upon capital stock invested in such business, that on account of the provisions of said section 1149, the tax collector of Duval County, one of the defendants in this cause, accepted from the Independent Furniture Company as explained in the affidavit of G. N. Wood filed in this cause October 19th, 1931, the sum of $10.00 on each retail place of business operated by that company in Duval County. That said Chapter 15624 contains no such exemption or exception in favor of furniture dealers, and the at-

tempted exemption so allowed or attempted to be allowed by the defendants in this cause is, as your orators are advised and believe and so allege, wholly unauthorized and [fol. 78] unwarranted. That in like manner the said defendant Comptroller, and the several tax collectors of the State of Florida, acting under his instructions by and with the advice of the said Attorney General are undertaking to exempt from the provisions of said Chapter 15624, not only filling stations engaged exclusively in the sale of gasoline and other petroleum products, but also to exempt filling stations selling those products plus tires and tubes. That the forms sent out by the defendants to tax payers throughout the state carry among others, the following instruction on the back thereof as to the application and administration of said act—"Filling stations engaged exclusively in the sale of gasoline and other petroleum products, and tire and tube dealers are not subject to this tax." That section 1061 Compiled General Laws provides a graduated tax for tire and tube dealers, depending upon the population of the town or city where such dealers do business, and it is on that section that the defendants acting on advice of the Attorney General are undertaking to exempt tire and tube dealers though no such exemption is found in said Chapter 15624. That the attempted exemption in favor of tire and tube dealers has been inaugurated as your orators are advised and believe and so allege, for the special benefit of the Standard Oil Company, which company operates a chain of several hundred filling stations in the state of Florida, and sells through them not only gasoline and other petroleum products, but also automobile tires and tubes.

That when said Committee substitute for House Bill 8-X was pending in the House of Representatives on June 19th, 1931 *so* appears by the House Journal of that date, pages 26 and 27, Mr. Lewis of Gulf County offered the following amendment to be added to the end of section 8 of said Bill:

[fol. 79] "Provided, however, the term "store" shall not apply to or be construed to mean or include any store primarily operated for the sale of gasoline or other petroleum products."

That in lieu of said proposed amendment a substitute amendment was offered creating the proviso which is now

found at the end of section 8 of said Act, and the amendment as adopted specially confines the exemption to filling stations exclusively engaged in the sale of gasoline and other petroleum products. Such being the declared intent of the Legislature, the defendents in this cause have no authority to vary the provisions thereof by the administration of said act, or otherwise.

That by the same process of reasoning the defendant comptroller, as your orators are advised and believe and so allege, is undertaking himself and to have the several tax collectors of the state to exempt automobile dealers whether second hand or otherwise, from the application of said chapter 15624 because section 1056 compiled general laws provides a graduated tax upon merchants of that kind. That in Jacksonville Florida William Catlin Inc. operates three second hand automobile places of business, and one, R. S. Evan, operates three second hand automobile places of business, one in Jacksonville, one in Tampa and one in Miami selling at retail nevertheless, under the construction and applications of said act by the comptroller as aforesaid, such operators of "stores" are not subject to said Act. That in like manner the defendant Comptroller is undertaking to exempt merchants dealing in cigars and tobaccos who are specially taxed by section 1120 Compiled General Laws. That the United Cigar Stores Company is a nationally known chain store organization, and has two cigar stores in the City of Jacksonville, and many other cigar stores [fol. 80] in other cities of the State of Florida selling at retail that the Smoke Shop Inc. has two cigar stores in the City of Jacksonville, selling at retail, but under the construction of the Comptroller, as aforesaid, none of the said cigar stores are subject to the provisions of said Act; also to exempt hay, feed and grain dealers at retail, who are required to pay a graduated tax according to population by Section 12 of Chapter 14491 Laws of 1931; also to exempt restaurants, cafes and eating saloons, because under sections 1256 Compiled General Laws, a graduated tax is provided, depending upon the number of seats found in each such place of business. That the Florida Fig Stand, Inc., operates four places of business in Jacksonville, Morrison's Cafeteria operates two places of business and National Baking and Lunch Company operates three, all in the City of Jacksonville, Florida, nevertheless, under the construction

and application of said act now being made by the Comptroller as aforesaid, none of said concerns are required to pay taxes as called for by said chapter 15624.

That there are still other merchants listed in the license taxing chapter of the Compiled General Laws, who are otherwise taxed than by section 1197 Compiled General Laws, and as to all such merchants and dealers, your orators are advised and believe and so aver, that the defendant comptroller acting under the advice of the attorney general of this state, is undertaking to exempt them from the provisions of said act.

That said chapter 15624 by virtue of sections 1, 5 and 8 thereof, carries its own definition as to who shall be subject to the license taxes sought to be imposed thereby; and [fol. 81] section 14 of said act in express words, repeals all laws and parts of laws in conflict therewith. And your orators are advised and believe and so allege that if all or any part of said act is a valid law, the exemptions aforesaid which are sought to be allowed by the defendant comptroller as aforesaid, are wholly invalid and unauthorized and will operate to deprive your orators severally of the equal protection of the law, contrary to the provisions of the State and Federal Constitutions severally as aforesaid.

XVI

Your orators would further show that the classifications aforesaid so attempted to be made by the Act of 1931, and the further classifications of the Comptroller as aforesaid, for the imposition of license taxes severally, have no reasonable basis, and have no just relation to the subject-matter to which the same are applied. That said attempted classifications and discriminations are unjust and arbitrary, and in derogation of secs. 1, 4 and 12 of the Declaration of Rights of the Florida Constitution, and in derogation of the "due process" and "equal protection of the laws" clauses contained in the 14th Amendment to the Federal Constitution. That the rights of these complainants secured by said constitutional provisions will be violated in all the particulars aforesaid if the provisons of said Act are applied and enforced according to the terms of said act or according to the exemptions attempted by the Comptroller. That the provisions of said Act aforesaid, which must be condemned when tested by said Constitutional provisions, constitute

such material parts of said Act that nothing thereof remains which can be enforcible, with the result that said Act is void in its entirety. That the elimination of the discriminatory features of said Act above pointed out, leaving the re-
[fol. 82] mainder in force, will produce a result not contemplated or intended by the Legislature, so that said Act is wholly void and *o*noperative, leaving in full force and effect the license Act of 1915, as now found in Revised General Statutes of Florida, and also found in Compiled General Laws of Florida.

[fol. 83] XVII

Your orator would further show that on account of the manner in which they severally find it necessary to carry on their several businesses an essential part thereof constitutes interstate commerce. That your orator Lewis K. Liggett Company in manner aforesaid supplies its retail store units in Florida and other states upon requisitions received from its several store managers by periodical shipments either weekly or twice a month from its central warehouse in New York City or from factories with which prior contracts have been made by your complainant in contemplation of such regular periodical shipments. That the making of contracts with the factories for such supplies and shipments, the transmission of orders from the store managers and the making and transportation of such regular periodical shipments, all and singular, constitute interstate commerce. That in order to keep fresh drugs and medicines on hand in such retail store units and prevent accumulation of old stock it is necessary to make frequent shipments as aforesaid from fresh sources of supply. That frequent shipments as aforesaid aid your complainant in securing a rapid turnover in said retail units. That what is true of complainant Lewis K. Liggett Company is in large part true also of Winn & Lovett Grocery Company which places orders with factories and producers, fruit and vegetable canneries in various parts of the United States upon contract calling for periodical shipments for your complainant either to Jacksonville or Sanford, Florida from which collecting depots distributions by frequent shipments and deliveries are then made to the respective retail stores of the Winn & Lovett Grocery Company situated at different points in Florida as aforesaid. That what is true of Lewis K. Lig-

gett Company and Winn & Lovett Grocery Company is also true, though in lesser degree, of Paxson's, Inc. in the han-
[fol. 84] dling of its business in the seven Florida Retail shoe stores as aforesaid. That other chain or multiple store operators find it necessary to carry on their several businesses in the State of Florida substantially in the same way. That merchants operating single stores only get their supplies principally from local jobbers or wholesale merchants. That members of cooperative groups such as the McKesson Drug Stores, Better Food Stores, and I. G. A. Stores get their supplies from local wholesale distributors, in which no interstate transaction is involved, and by getting frequent supplies from such local distributors, such competitors of the chain stores are able to obtain rapid turnover of their stock in the manner hereinbefore explained. That the aforesaid interstate characteristics of chain store operations was well known to the Legislature when said Chapter 15624 was passed. That the Legislature, being so informed, designedly undertook by the oppressive, arbitrary and excessive license fees called for by said Act to burden the interstate characteristics of your orators' several businesses as aforesaid. That the commerce clause of the Federal Constitution entitled your orators to carry on the interstate features of their several businesses without hindrance and without such burdens as are attempted
[fol. 85] to be imposed by said Act by virtue of those interstate characteristics of said businesses, and on account of said rest*ir*ctions and burdens upon said interstate commerce, conducted as aforesaid, the said Act is void because in conflict with the commerce clause of the Federal Constitution.

That national food chain store operators buy annually in Florida millions of dollars worth of citrus fruits, irish potatoes, strawberries, fresh vegetables, canned grapefruit, and other Florida products, from producers and cooperative marketing associations, which are distributed in interstate commerce, and sold through their respective retail stores in other states direct to consumers. That in like manner, your orator Louis K. Liggett Company buys from Florida producers large quantities of citrus fruits, fruit juices, extracts and byproducts for interstate transporation and sale through its retail stores in other States. That your orators

are advised and believe by the decision of the Supreme Court of Florida in the case of—

Lee v. Clearwater Growers Assn., 93 Fla. 214, 111 So. 722.

That neither such buying nor such selling constitutes monopoly, or any tendency in that direction.

[fol. 86] XVIII

Your orators would further show that each of them have tendered to the defendant R. F. Bowden, Tax Collector of Duval County, Florida, all the license taxes assessable for State and County licenses in Duval County, Florida, under sec. 926 Revised General Statutes (sec. 1197 Compiled General Laws), and other related parts of the license laws in force prior to said Act of 1931, but the said Tax Collector of Duval County has refused to accept the same. That your orator Winn & Lovett Grocery Company has in like manner tendered to the defendant R. B. Council, Tax Collector of Leon County, Florida, all license taxes payable under said prior law for the operation of the said Winn & Lovett Grocery store owned and operated in the City of Tallahassee, Florida, as aforesaid, but the said Tax Collector of Leon County has refused to accept the same. That these complainants stand ready, and hereby offer to pay to the several tax collectors of the respective counties of Florida where their said businesses are severally located all license taxes due and payable under the law in existence prior to said Act of 1931, and in like manner these complainants stand ready, and hereby offer to pay to the several municipalities where their said stores are severally located the license taxes due said municipalities under said old law. Nevertheless, the said Tax Collector of Duval County, and the said Tax Collector of Leon County, acting on instructions from the defendant Ernest Amos, Comptroller of the State of Florida, will not accept the license taxes tendered under the old law for State and County licenses by these complainants, as aforesaid. And the said Tax Collectors and the said Comptroller now threaten to cause these com- [fol. 87] plainants severally, and their several store managers, to be prosecuted for doing business without a license, and for other violations of said Act of 1931; also to impose 25% penalties as provided in sec. 4 of said Act. That by

reason of the penalties imposed by said Act of 1931, and sought to be imposed by the defendants, the several businesses of these complainants are in great jeopardy, and the injury to their several businesses will be irreparable unless the defendants severally are restrained and enjoinfed from enforcing or caused to be enforced the provisions of said license act of 1931. That on account of the action of the defendant Comptroller, as aforesaid, these complainants are unable to procure from the several County Tax Collectors where they do business, licenses as provided under the old license act. That in like manner, on account of the action of the Comptroller, as aforesaid, these complainants are unable to procure licenses from the several municipalities of the State of Florida where they severally do business, the said Comptroller claiming to have the right exclusively to issue to store operators such as these complainants a State and County license as provided for in sec. 3 of said Act of 1931, and municipal license as provided in sec. 11 of said Act, and the right to countersign all licenses as provided in sec. 12 of said Act. That the actions of said Comptroller and of said Tax Collectors of Duval County and Leon County, as aforesaid, are and will leave these complainants wholly unprotected and subject to prosecutions under sec. 9 of said Act, on account of having no State or County license under which to do business, and under sec. 11 of said Act, on account of having no municipal license in the several municipalities where these complainants severally do business. That these complainants severally are [fol. 88] without remedy unless this Honorable Court will issue its writ of injunction, restraining the said defendants severally from attempting to enforce said Act of 1931, and from interfering with the lawful procurement by these complainants of proper licenses, as aforesaid, under the prior law.

The premises being considered, your orators pray that the defendants severally may be required to answer this amended bill of complaint, but not under oath, (answer under oath being waived), as specifically as if interrogated thereto; and further pray:

1. That the entire Act known as Chapter 15624 Laws of Florida, 1931, and otherwise designated as Committee Substitute for House Bill No. 8-X, be declared null and void and of no force and effect.

2. That if the whole of said Act be not declared entirely null and void, that the discriminatory features thereof heretofore complained of in this amended bill, be declared null and void, and unenforceable.

3. That the defendant Ernest Amos, Comptroller of the State of Florida, and the defendant R. F. Bowden, Tax Collector of Duval County, and the defendant R. B. Council, Tax Collector of Leon County, be severally restrained and enjoined until the further order of this Court from enforcing, or causing to be enforced, any of the provisions of said Act of 1931, and from interfering with these complainants, or other merchants similarly situated, from procuring proper State and County, and Municipal licenses under the license laws heretofore in force; and that upon final hearing such injunction and restraining order may be made permanent.

[fol. 89] 4. That the defendants severally may be restrained from allowing the exceptions and exemptions complained of in sec. XV of this amended bill.

5. That these complainants, and others similar- situated in the State of Florida, may have such other and further relief as equity may require and as to this Honorable Court may seem meet.

That the Court will grant unto your Orators the State's Most Gracious Writ of Subpœna, directed to Ernest Amos, Comptroller of the State of Florida, R. F. Bowden, Tax Collector of Duval County, Florida, and H. B. Council, Tax Collector of Leon County, Florida, returnable according to law, and the course of this Honorable Court.

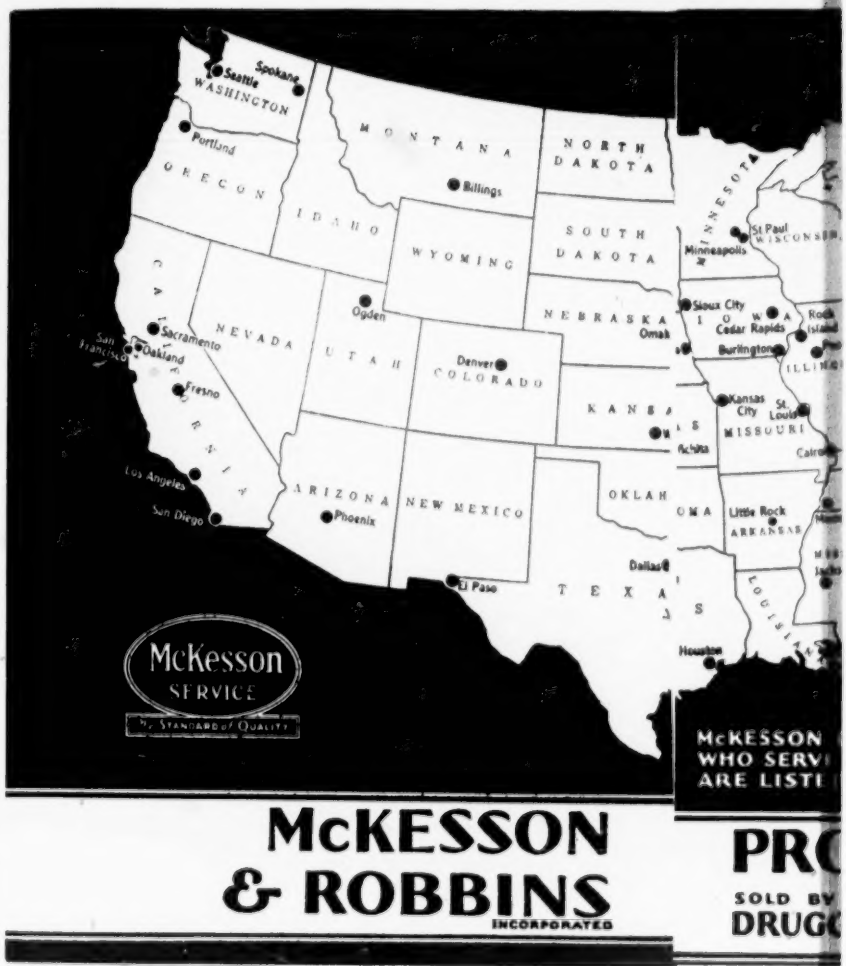
And your orators will ever pray, etc.

L. K. Liggett Company, by R. T. Lewis, Jr., Store Manager. Winn & Lovett Grocery Company, by W. R. Lovett, President. Paxson's Inc., by Roy H. Paxson, President. (Corporate Seal.) Thos. B. Adams, Kay, Adams, Ragland & Kurz, Solicitors for Complainants.

[fols. 90 & 91] *Duly sworn to by W. R. Lovett et al. Jurats omitted in printing.*

(Here follows Exhibit 1 to Amended Bill of Complaint, side folio 92)

EXHIBIT NO. 1 - TO AMENDED BILL OF



McKESSON & ROBBINS
INCORPORATED

PRODUCTS
SOLD BY
DRUGGISTS EVERYWHERE

[fol. 93] EXHIBIT 2 TO AMENDED BILL OF COMPLAINT

McKesson & Robbins, Inc., products are distributed throughout the entire civilized world by their own houses. They are sold by leading druggists everywhere.

A List of McKesson Companies

Alabama:

McKesson-Bedsole-Colvin, Inc., Mobile
McKesson-Doster-Northington, Inc., Birmingham
McKesson-Berry-Martin Company, Florence

Arizona:

McKesson-Western Wholesale Drug Company, Ltd., Phœnix

Arkansas:

McKesson-Lincoln Company, Little Rock

California:

McKesson-Kirk-Geary Company, Ltd., Sacramento
McKesson-Langley-Michaels Company, Ltd., San Francisco
McKesson-Langley-Michaels Company, Ltd., Oakland
McKesson-Langley-Michaels Company, Ltd., Fresno
McKesson-Western Wholesale Drug Company, Ltd., Los Angeles
McKesson-Western Wholesale Drug Company, Ltd., San Diego

Colorado:

McKesson-Colorado Wholesale Drug Company, Denver

Connecticut:

McKesson-Whittlesey Company, New Haven
McKesson & Robbins, Incorporated, Bridgeport

Florida:

McKesson-Groover-Stewart Drug Company, Jacksonville
McKesson-Groover-Stewart Drug Company, Tampa
McKesson-Groover-Stewart Drug Company, Miami
McKesson-Groover-Stewart Drug Company, Orlando

Georgia:

McKesson-Murray Drug Company, Augusta
McKesson-Riley Drug Company, Macon

Hawaii:

McKesson-Langley-Michaels Drug Company, Ltd., Honolulu

Illinois:

McKesson-Churchill Drug Company, Peoria
McKesson-Fuller-Morrison Company, Chicago
McKesson-Hartz Drug Company, Rock Island
McKesson-Schuh Drug Company, Cairo

Iowa:

McKesson-Churchill Drug Company, Burlington
McKesson-Churchill Drug Company, Cedar Rapids
McKesson, More & Porterfield, Inc., Sioux City

Kansas:

McKesson-Potts Drug Company, Wichita

Kentucky:

McKesson-Peter-Neat-Richardson Company, Louisville

Louisiana:

McKesson-Parker-Blake Corporation, New Orleans

Massachusetts:

McKesson-Eastern Drug Company, Boston
McKesson-Eastern Drug Company, Springfield

Michigan:

McKesson-Farrand-Williams Company, Detroit

Minnesota:

McKesson-Minneapolis Drug Company, Minneapolis
McKesson-St. Paul Drug Company, St. Paul

Mississippi:

McKesson-Van Vleet-Ellis Corporation, Jackson

Missouri:

McKesson-Faxon Drug Company, Kansas City
McKesson-Merrill Drug Company, St. Louis

Montana:

McKesson-Midwest Drug Company, Billings

Nebraska:

McKesson-Churchill Drug Company, Omaha

New Jersey:

McKesson-Roeber-Kuebler Company, Newark

New York:

McKesson-Gibson-Snow Company, Inc., Albany
McKesson-Gibson-Snow Company, Inc., Buffalo
McKesson-Gibson-Snow Company, Inc., Rochester
McKesson-Gibson-Snow Company, Inc., Syracuse
McKesson-Gibson-Snow Company, Inc., Troy
McKesson-Gibson-Snow Company, Inc., Bronx Branch, New York City
McKesson-Gibson-Snow Company, Inc., Eisen Branch, Yonkers
McKesson-Gibson-Snow Company, Inc., Littell Branch, New York City
McKesson-Gibson-Snow Company, Inc., Brooklyn Branch, New York

Ohio:

McKesson-Hall-Van Gorder Company, Akron
McKesson-Hall-Van Gorder Company, Cleveland
The McKesson-Voegler Drug Company, Cincinnati

Oregon:

McKesson-Pacific Drug Company, Portland

Pennsylvania:

McKesson-Gibson-Snow Company, Scranton

Rhode Island:

McKesson-Eastern Drug Company, Providence

South Carolina:

McKesson-Murray Drug Company, Columbia

Tennessee:

McKesson-Duff Drug Company, Chattanooga
McKesson-Berry-Martin Company, Nashville
McKesson-Van Vleet-Ellis Corporation, Memphis

Texas:

McKesson-Crowdus Drug Company, Dallas
McKesson, Kelly & Pollard Company, El Paso
McKesson-Southern Drug Company, Houston

Utah:

McKesson-Ogden Wholesale Drug Company, Ogden

Virginia:

McKesson-Roanoke Drug Corporation, Roanoke

Washington:

McKesson-Spokane Drug Company, Spokane
McKesson-Stewart-Holmes Drug Company, Seattle

West Virginia:

McKesson-Huntington Drug Company, Huntington

Canada:

McKesson & Robbins, Limited, Montreal

Norway:

Isdahl & Co. A/S., Bergen

[fol. 94] EXHIBIT 3 TO AMENDED BILL OF COMPLAINT

Grocers:

Abdullah Elijah 1300 W Duval	3-9152
Abdullah George 31 Stonewall	5-9859
Abdullah Paul 600 Washington	5-9231
Abdullah Sam 456 Phelps	5-9935
Abraham Bros 301 Magnolia	5-9706
Abraham John 803 Jefferson	5-9518
Adams General 1021 Madison	5-9771
Adams Street Market 1204 W Adams	5-5933-W
Albert & Bros 1290 Davis	3-9408
Albert George 12th & Phœnix	5-9260
Allen Bros 2257 Oak	7-2181
Amber Bros 3108 Main	5-7729
Anderson's Groc & Mkt 3628 Park	2-1897
Anton Louis 1601 Davis	3-9440
Arnau's Cash Groc & Mkt 3509 Pearl	3-0646
Assaf N A 1023 Dora	5-9527
Atlantic Groc & Fruit Co 3556 St Johns av	7-8655
Atlantic Provision Co 1013 Myrtle av	5-2293
Atter Sam 502 Davis	5-9584
Avondale Gro 3550 St Johns av	7-2191
Azar A Mrs 201 Park	5-9387
Bailey H C 1100 Davis	5-6189
Barkat Abraham 720 Johnson	5-2994-J
Barkat Tom 1300 W Adams	5-9943
Bell Grocery Co 2034 Davis	3-1690
Belote Gro 3221 Pearl	5-5899-J
Bernreuter J L rear 3807 Main	5-5397
Bettoli Joseph 928 W Adams	5-9501
Blas J F Grocery 803 Edgewood av	2-9188
Blitch's Red Front Stores	
Ofc Enterprise av	5-7551
Store No 9 19 E Bay	3-1018
No 52 615 Atl blvd S Jax	5-3325
Store No 54 3563 St Johns av	2-1340
Store No 56 2010 Pearl	5-7412
Store No 59 4203 St Johns av	2-2670
Store No 60 2708 Forbes	7-1286
Store No 64 558 Park	7-2363
Store No 65 547 W 28th	3-1428
Store No 66 883 Stockton	7-2468

Store No 68 1506 King	7-2326
Blue Grass Market 825 Newnan	5-9517
Blue Ribbon Groc & Market 423 Main	5-6071
Bostic J B 3618 Kooker	3-9528
Boulevard Groc 1700 Lake Shore dr	2-1290
Branch J C 400 Park	5-9387
Brewington Daisy 1476 Franklin	5-9748
Brinkley H W 2054 Main	5-1510
Brown R L 1001 W Church	5-9728
Bryan R D 1721 Davis	5-4891-W
Burnsed G D 816 McDuff av	2-9129
Busy Bee Groc Co 1611 Lackawanna av	5-9680
Carmen St Gro & Market 2250 Walnut	5-7396
Carter G E Market & Groc Co 3126 Pearl	5-4872
Catter & Sons 1135 W Beaver	5-9511
Center St Grocery 563 Center	5-9482
Church St Cash Grocery 1422 W Church	3-9518
Clayton Thomas 17th	5-9815
Clover Farm Store 900 Talleyrand av	5-7666
Coleman's Grocery 720 Franklin	3-9180
College St Gro 2727 College	7-2154
Compton Bros Lem Turner rd	5-8961-W
Cook & Weeks 351 E 8th	5-4781
Cook's Grocery 1801 E 21st	5-9370
Corey Gro Co 701 Jefferson	5-9380
Corey Grocery Co 1132 W Adams	3-9294
Covington H T 221 Price	5-9654
Crews J P 2346 W Beaver	3-9460
Crews L A 2925 Corinthian av	2-2872
Crews W C 703 McDuff av	7-2103
David A K 1518 King	7-2151
Davis C E St Augustine rd S Jax	5-4046-W
Davis Red Front Grocery 1333 Fla av	5-9750
Davis W A 248 W 16th	3-9272
Daylight Grocery 308 Broad	3-1790
Daylight Grocery Co 308 Broad	3-1792
Debs N 1678 Fla av	5-9453
Debs N 1200 E 1st	3-9481
Dellwood Grocery Co 614 Dellwood av	7-1837
Dennard C B 5015 W Beaver	7-7781
Doomar's Groc & Mkt 157 E 8th	5-4683
Dopson's Groc & Mkt 203 E 21st	5-5118
Easters J F 302 N Stockton	7-4427

Eisenberg M 342 S Myrtle av 3-0071
Elian Abud 101 Park 5-9866
Elian Grocery Co 1500 Franklin 3-9551
Elian N Groc & Mkt 2824 Main 3-9182
Ellias Albert Gro 1155 Hickory 5-9927
Ellias George 540 W State 5-5501
Ellis L J Lackawanna av 7-8264
Fairdeal Gro & Market 1202 Walnut 5-6653
Farris N A 402 Davis 5-3207
Fleeman H T Riverview 5-5938
Fleming E W Co McDuff av 7-2439
Fla Provision Co 702 W Bay 5-0566
Foor A M 700 W 4th 5-5956-J
Foor's Sam Grocery 1603 Louisiana 5-9528
Fulford A A 1501 Fla av 5-9602
Gantling's General Mdse Store 1301 Fairfax 3-9173
Garrett L N 745 Bredier 5-9514
Garrett & Sons 1105 W Church 5-9657
Gason Grocery Co 213 St Johns S Jax 5-4168
Genho Elias 72 S Myrtle av 5-9828
George Albert 809 W 8th 3-9298
Gilt Edge Gro Co 624 Fla av 5-9323
Globe Gro Co Enterprise av 5-4700
Gold Eagle Gro Co 320 Broad 5-3181
Goldsmith S N 864 Franklin 5-9867
Grand H F 273 McDuff 3-9486
Grand H M 456 E 3rd 5-5789
Great Atl & Pac Tea Co 427 Main 3-1215
Great Atl & Pac Tea Co 347 E 3rd 5-9662
Great Atl & Pac Tea Co Cooley av 3-1490
Great Atl & Pac Tea Co 611 Atl blvd S Jax 5-9995
Great Atl & Pac Tea Co 1170 Edgwood av 2-9143
Great Atl & Pac Tea Co 3575 St. Johns av 2-1174
Great Atl & Pac Tea Co 1602 Laura 5-9349
Great Atl & Pac Tea Co 2519 Main 5-9804
Great Atl & Pac Tea Co 1839 Main 3-9541
Great Atl & Pac Tea Co 1802 Walnut 3-9545
Great Atl & Pac Tea Co 1245 King 2-9170
Great Atl & Pac Tea Co 5605 St Johns av 2-9176
Great Atl & Pac Tea Co 150 E 1st 5-9620
Griffen W T 1053 Kings rd 5-3234
Griffin Cash Grocery No 2 1325 W State 3-9268
Grimes W E 2841 Walnut 3-9237

Gwynes J H Mrs 2351 Lackawanna av 5-9289
Haddock E C 2141 Phœnix av 5-2235
Handy-Dandy Groc Co 2784 Herschel 7-7630
Hanne Bros 1452 W Church 3-9113
Harkisheimer Co 25 E Bay 5-7077
Harrell S W 931 Dellwood av 7-3191
Harris H R 1344 E 21st 5-6720-J
Hartley Effie Miss 50 Riverside av 5-9803
Hawkins O H 7308 Main 3-0603
Hazouri A N 1135 Louisiana 3-9240
Hazouri John Mrs 1073 W Ashley 5-9695
Hazouri Louie Meats & Gro 908 Davis 5-9693
Hearn & Co 1724 Davis 5-9283
Hill D N 2155 Lackawanna av 7-1106
Hill W H 3303 Plymouth 7-5140
Hilow Geo 1420 Davis 3-9455
Hoke C H 3302 Evergreen 5-2416
Holmes J M & Co 19 S Ocean 5-0611
Horne Gro Store 730 Bredier 5-9681
Howard & Goodman 1137 Forest 3-9271
Howard's Corner Grocery 1204 Edgewood av 7-5740
Howard's Groc 652 W 8th 5-9622
Hudson O B 5103 Main 5-4264
Ideal Grocery Co 2575 Lackawanna av 7-1653
Ina Bos 300 Davis 5-9744
Independent Stores Co 20 S Davis 5-0636
Ingels J F 1202 Murray av 7-5884
Isaacs I 1333 Roselle 7-1418
Isdal H 801 Lackawanna av 5-9266
Isenmann Chas 900 Newnan 5-9352
Jackson Clarence J 803 E 56th 5-1157-J
Jacksonville Grocery 1634 Kings rd 3-9400
James Grocery Co Inc Grand Crossing 5-4612
James Grocery Co No 5 104th 2-9156
Japour A J 900 Pippin 5-9746
Japour D 1576 Fla av 5-9170
Japour L 143 E Union 5-2742-W
Japour Peter 1137 Ionia 5-7483
Jenkins John 1615 Johnson 5-9431
John Albert 347 Dellwood av 5-9291
Johnson J E Mrs 722 E 56th 5-6067-J
Johnson L O 909 Hogan 5-5577
Jones Henry T 1702 Swift 3-9163

Jones Willie 975 W 5th 5-8049-J
Jordan Economy Gro 1500 Main 5-9397
Joseph A 122 Dora 3-9184
Joseph A Groc 1200 Forest 5-9458
Joseph Charlie 1105 Hogan 5-9577
Joseph Charlie 1032 Fla av 5-9522
Joseph George 1001 Julia 5-9534
Joseph S & Bros Fruits and Vegetables, Fancy and Staple Groceries, Prompt Delivery Service, 229 Broad 3-0480
Joseph S & Bros 2027 Pearl 5-3346
Joseph Tony 2901 Main 5-9725
Joy L E 502 McDuff av 2-9145
Julia St Grocery 302 W State 3-0853
Kass Gro Co 426 W Bay 5-6131
Kelly T J 2510 Phœnix av 5-9362
Kennedy J C 6124 Norwood av 5-0567
Kings Road Grocery & Mkt 2702 Kings rd 5-8247-J
Kirkland Grocery 2098 Forrest 5-9875
Koelman E D Groc 4442 Monerief rd 5-6205-J
Koons Cash Store 2050 Phœnix av 3-9132
Koons R L 2050 Phœnix av 5-4903
Korey George M Cash Groc Co 2331 Herschel 7-1022
Korey & Abraham 603 Liberty 5-9921
Kowkab & Son 3202 Myrtle av 5-9810
Kowkabany C J 1004 Myrtle av 5-9367
Kowkabany M 1001 W Duval 5-9592
Kowkabany N Market & Groc 101 E 10th 5-2632
Kress Groc & Market 935 W Monroe 5-9778
Kristle Grocery & Market 3927 Main 5-7717
Lackawanna Gro Co 2584 Lackawanna av 7-2156
LaVilla Park Cash Grocery 1401 W Church 3-9172
Leslie J K Evergreen av 5-9623
Lewis E 1298 Pearl 3-9517
Liberty St Grocery 1654 Liberty 5-9642
Lincoln Anna C Mrs 1702 E Beaver 3-9496
Lincoln Grocery Co 530 Johnson 5-9128
Lindsay D J 1500 Davis 5-9781
Lisle W A 1334 Kings rd 5-9636
Lohr John S 818 McDuff av 7-5512

Loudan's Cash Grocery 915 Lewis 5-9616
Louis Cash Grocery 1601 Myrtle av 5-9648
Lowe S B Mrs 1426 Miller av 3-9216
MacInnes Grocery & Market Kooker 5-9429
Mack's Grocery & Market 526 Spearing 5-5380
Mackoul Frank 102 S Myrtle av 3-9515
Markovitz V 2107 Lackawanna av 5-9481
Martin D W 1545 E 8th 5-9133
Mathews D E 296 Woodlawn 5-9538
Mathis Cash Gro 51 Oak 5-9860
McCormick C W 1502 Evergreen av 5-1737
Meyers Cash Gro 2163 Mars av 5-9240
Michael Gro Co Magnolia & St Johns av 5-7524
Mike Bros 902 Fla av 5-9381
Millan James 1511 Pine Grove av 2-9167
Monerief Cash Groc 2201 Monerief av 5-9402
Montgomery Cash Grocery 1654 Cleveland 3-9165
Moonshine Gro 21st & Fisher 5-9598
Mordt Groc Co 316 Cedar S Jax 5-9270
Morgan J M 6518 Evergreen av 5-8836-J
Morrison Groc Co 4005 Talleyrand av 5-9197
Moses Alex 1125 Julia 5-9259
Mosley K A 1400 Jefferson 5-9254
Mosley S 735 W 3rd 5-2096
Mott-McCall Co 480 Riverside av 7-2146
Murrell C W Atl blvd S Jax 5-7131-J
Nader Milk Depot 855 Stockton 2-9153
Namey Sam 1264 Kings rd 5-9157
Napoli Frank 530 Davis 5-1405
Nash Frank 1525 Wilcox 5-4888-W
National Gro Co 202 Fla av 5-4267
Nobles J C Grocery Lake Shore dr 2-9147
[fol. 95] Noel Gro & Market 732 LaFayette 5-3034
Norse Abraham 702 Market 5-9625
O K Gro 504 Fla av 5-0623
O'Driscoll J S 1708 E 21st 5-5677-W
Ossi A R 1003 Davis 3-1436-J
Ossi Bros 869 Fla av 5-7652-W
Panos Gus 301 Main 5-1377
Parker J H & Bros Talleyrand & 27th 5-3742
Parmenter Grocery 2885 Evergreen av 3-9266
Patterson J J 301 E 21st 5-9763

Paul J E & Sons 1418 Myrtle av 3-0911
Paul's Groc Store 930 Rosselle 7-2121
Pearl St Gro 1856 Pearl 5-9627
Peoples Grocery & Market 336 E 10th 5-9618
Phifer V L 3203 Lackawanna av 7-2106
Phillips & Jones Gro Co Edgewood av 7-1071
Phoenix Avenue Groc & Mkt 1101 E 15th 5-2247
Phoenix Cash Groc Co 5411 Buffalo av 3-9181
Piggly Wiggly Jax Co
Store No 1 3860 Pearl 5-9784
Store No 2 340 Riverside av 5-4364
Store No 3 1919 Main 5-6642
Store No 4 345 E 3rd 5-1277
Store No 5 141 Broad 5-9884
Store No 6 415 Main 3-0701
Store No 7 3635 St Johns av 2-1503
Store No 8 1516 King 7-5031
Store No 11 104 St John av S Jax 5-9848
Store No 12 1043 Park 7-4749
Store No 13 1188 Edgewood av 7-4089
Store No 15 2801 Main 5-1792
Store No 20 705 Kings rd S Jax 5-2635
Store No 26 2421 W Beaver 7-8149
Store No 27 2695 Post 7-6156
Pinedale Grocery 3601 Lenox av 7-5790
Porter John E 1250 E 14th 5-2890
Post St Grocery & Market 2961 Post 7-3914
Preston Gro Co 1208 Lackawanna av 5-9732
Purity Groc Co 300 W 33rd 5-1863
Rabban J T 1004 Myrtle av 5-8500-W
Raffo Sam 727 Fla av 3-9523
Rahaim George 1518 Enterprise av 5-0548-J
Rahaim Grocery & Market 928 Hogan 3-9537
Rahaim Joe 1443 W Beaver 5-9296
Rahaim John 1001 Myrtle av 5-1724
Red Corner Gro Store 2675 Enterprise av 5-7166-M
Red Star Gro Store 760 W Union 5-9964
Rizk Joe 1301 Davis 3-1188-R
Roberts F M Grocery 2414 Evergreen av 5-9667
Rodd Joseph 519 W State 3-9119
Rose's Cash Grocery 1753 Market 5-7892
Roselle St Gro & Market 2002 Roselle 7-2162
Rowe Burt E 100 Broadway 5-9677

Rust F A 1502 Kings rd 5-9261
Safar A 2033 Davis 5-9724
Safar A E 736 Davis 3-9533
Saig Louis Groc & Mkt 630 Johnson 5-9720
Sanitary Gro 825 Talleyrand 5-4366
Sanitary Grocery Co 1401 Enterprise av 3-9190
Saour Bros 1068 Fla av 5-9568
Saporita Stephen 302 Cleveland 5-9243
Saunders Clarence Stores
Store 101 27 W Bay 5-9660
Store 102 1928 Main 5-9670
Store 103 1032 Park 2-9155
Store 104 110 St Johns av S Jax 5-9672
Store 105 324 Broad 5-9664
Saxby Cain 1818 E 21st 5-9590
Seaman M J 752 DeWitt 3-9344
Seaman M J 1612 W Beaver 3-9477
Sebra Toney G 1123 Myrtle av 5-5361
Seeba Chris 1116 Kings rd 5-9303
Selber's Gro 1749 Ionia 5-6397
Serve U Grocery Co 2510 Oak 7-1508
Service Grocery 1138 Kings rd 5-9358
Setzer M 1449 E Duval 3-0097
Setzer's Stores
No 1 1705 Silver 5-6633
No 2 209 W 11th 5-1124
No 3 20 E 8th 5-1111
No 4 1449 Market 5-1834
Shahood Allen 1115 Jackson 5-7325-M
Shahood George 1271 W Union 3-9191
Shatkowsky Fannie Mrs 1216 Fla av 5-9262
Sheffield & Faulkner Ortega 2-9151
Shields Gro & Market 303 E Adams 5-2603
Shields Harvey Old St Augustine rd 5-4509-R
Silverstein A Mrs 1702 E Church 5-3572
Simons S A 1856 Pearl 5-5788
Sixteenth St Groc & Mkt 53 E 16th 5-0775
Sixty-Third St Groc 635 E 63rd 5-9542
Skaff D 1020 Fla av 3-9416
Slocum Harry 1003 Missouri 3-9195
Smith F A Mrs 929 Jefferson 3-9117
Solomon B 1251 W Church 5-9520
Soud A 1100 Julia 5-9919

Soud Bros 706 Davis 5-3591
Soulis Peter 22 Margaretta 5-9904
Star Grocery Co 502 Davis 3-9331
Steele's Cash Grocery 2740 Franklin 3-9345
Stokes J W 5930 Lem Turner rd 5-5548-R
Summers Grocery & Market Lem Turner rd 5-8095-R
Susman Morris 930 E Union 5-8504
Swift William 1800 Walnut 3-9169
Taylor G L Orange Pk rd 2-9172
Tenth St Gro & Mkt 10th 5-4886
Tracy A C 4725 Lackawanna av 7-3370
Tutson Samuel 1901 Windel 5-4350
Tyler Gro Co 404 W Bay 5-3251
Tyson R R 406 Chelsea av 5-7380
Uneeda Cash Gro 713 Main 5-6717
Watts J S Fruit & Vegetable Market 1000 Atl blvd S Jax 5-1291
Townsend C I 1776 Evergreen av 5-9562
Tutson Samuel 1901 Windle 3-9155
Uneeda Cash Gro 811 Main 5-6717
Watts J S Fruit & Vegetable Market 1000 Atl blvd S Jax 5-9377
Weeks O B & Son Lem Turner rd 5-8120-J
Weston G W 821 Darwin 5-9333
Whiddon's Cash Stores
Main Ofc 703 E Ashley 5-2667
No 1 212 Washington 5-5512
No 2 2708 Forbes 7-6701
No 3 556 Riverside av 7-1879
No 4 2051 W Beaver 7-1319
No 6 1186 Edgewood av 7-1230
No 7 3585 St Johns av 2-2137
No 8 1641 Main 5-5246
No 9 1913 Main 5-5193
No 10 2540 Oak 7-3023
No 11 2804 Main 5-5203
No 12 351 E 3rd 5-5510
No 13 2902 Pearl 5-5442
No 15 Pearl 5-5487
No 16 422 Fla av 5-5319
No 17 419 Main 5-5639
No 18 1516 King 7-2244
No 19 Masonic bl S Jax 5-5396

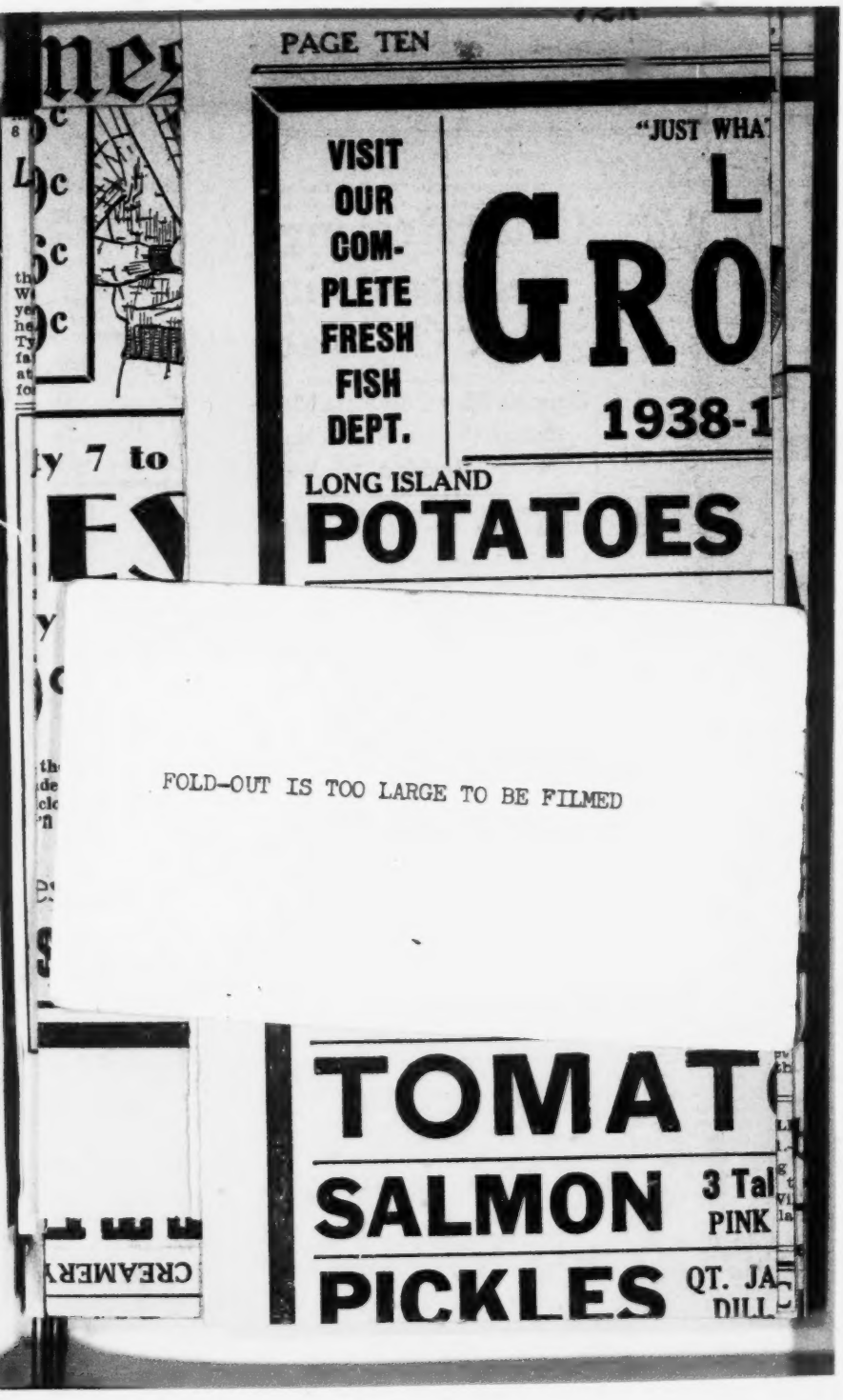
No 20 566 Park 7-2312
No 21 2636 Lackawanna av 7-2268
No 22 1268 McDuff av 7-1808
No 23 351 E 8th 5-5431
No 24 700 Newman 5-5358
No 25 446 McDuff av 7-1806
No 26 44 E 1st 5-5305
No 27 2214 Phoenix av 5-5316
No 28 28th 5-0228
No 30 2042 Roselle 7-2091
No 33 1012 Park 7-2361
No 34 704 Kings rd S Jax 5-5266
No 37 Forrest S Jax 5-5342
No 38 Lem Turner rd 5-5272
No 39 2902 Corinthian av 2-1372
No 40 4905 Lakeshore dr 2-1243
No 41 600 Hendricks S Jax 5-5600
No 42 3105 Main 5-5580
No 44 3919 Main 5-5532
No 46 863 Stockton 7-2231
Prem Station 521 Laura 5-4641
White Star Gro Co 723 Forrest 5-3766
Whiteway Grocery Atl Blvd S Jax 3-9410
Whiteway Groc & Market 809 W 8th 3-9298
Williams B B 350 Kings rd S Jax 5-6676
Williams Groc & Market 1243 Jessie 3-9393
Winn & Lovett Groc Co Inc Enterprise 3-2480
Produce Dept W Beaver 5-1330
Executive Dept Hildebrandt bl 5-2312
Wood J C Grocery Co 1454 E Duval 5-9255
Wurm Adolph 3953 St Johns av 2-2169
Yazge Balach 1702 Harrison 5-9854

Grocers, Wholesale

City Grocery Co ACL Whse 16 3-0750
Clark & Lewis Inc 844 E Bay 3-0625
Cumberland & Liberty Mills Co Viaduct 5-3102
Frieseke Wholesale Groc Hubbard 5-6122
Hagin-Peters Co ft Hogan 5-1964
Lewis-Chitty Consolidated Co 218 E Bay 5-7914
Libby McNeill & Libby Union Term 5-3892
Manucy J E 26th 5-0751

McNerny Grocery Co Riverside Viaduct 5-0087
Peninsular Naval Stores Co Union Term 5-0498
Reid Murdoch & Co 760 W Bay 5-2422
Southern Grocery Co 402 E Bay 5-2249
Stinson Sharman Co ft Newnan 5-7411
United Produce Co Enterprise av 5-5215
Zaring C W & Co 835 E Bay 5-2837
Zaring C W & Co 710 W Bay 5-2444

(Here follows Exhibit 4, section of Florida Times-Union, September 12, 1931, side folio 96)



VISIT OUR COM-PLETE FRESH FISH DEPT.

"JUST WHA

L

GRO

1938-1

LONG ISLAND

POTATOES

FOLD-OUT IS TOO LARGE TO BE FILMED

TOMAT

SALMON 3 Tal

PINK

PICKLES QT. JA

DILL

CREAMERY

Cohen Brothers

The Big Store

QUALITY

CLOTHES

[fol. 97] EXHIBIT 5 TO AMENDED BILL OF COMPLAINT

This Agreement, made this — day of ——, 192-, by and between —— Company of Florida, party of the first part, hereinafter known as the "Company," and —— ——, of the —— of ——, County of ——, State of ——, party of the second part, witnesseth:

The Company proposes to offer during the term of this Agreement to a selected list of Retail Grocers, certain advantages as hereinafter outlined. The Company agrees to give to the second party the right to use the name "Clover Farm Store" and further agrees to sell all merchandise which it may offer to the second party on a limited Profit Basis.

Upon the signing of this contract, the party of the second part is given the right to become a member of the Clover Farm Stores Company, whose stockholders are Independent Retail Grocers of Ohio, Pennsylvania, Florida, North Carolina, Indiana and any other State where their members may be located, provided his or her application for membership is favorably passed upon by the Company.

The second party agrees to purchase One (1) Share of the Capital Stock of The Clover Farm Stores Company at the Par value of One Dollar ($1) said stock being fully paid and non-assessable, the second party not being liable for any debt, failure or liability of any other member of The Clover Farm Stores Company or for any debt or liability of the Company.

The second party agrees to paint the front of his or her store building with The Clover Farm Stores Company's standard color, the Company agreeing to furnish the necessary paint which will be furnished to the second party f. o. b. its warehouse or factory. The second party further [fol. 98] agrees to paint the front of said building at least once a year thereafter, and upon termination of this contract from any cause whatever, the second party agrees upon such termination to immediately repaint his or her store front in entirely different colors.

The Company agrees to furnish to second party, One regulation Clover Farm Store sign, and other supplies, valued at One Hundred Dollars ($100), the sign being twelve (12) or fourteen (14) feet in length, twenty (20)

inches in height, all letters raised wood covered with pure gold leaf, containing twenty-one (21) special letters reading "The Clover Farm Stores Co." the second party agreeing to maintain said sign on and across the front of said store. Upon demand by the Company for the return of the sign due to failure of second party to comply with the terms of the contract, delivery shall be made promptly to the Company's warehouse, delivery charges prepaid, and thereupon the Company will refund to second party the cost price of the sign to the Company, less a depreciation of thirty-five (35%) per cent per annum.

The second party agrees at the time of signing this contract to pay to the Company the sum of One Hundred Dollars ($100) which will constitute security for the return of said sign on demand, and also for services rendered and supplies furnished to second party, the Company also furnishing at its own expense all legal advice and assistance that may be necessary to second party in opening a Clover Farm Store.

The second party agrees during the life of this contract to purchase from the Company as far as possible his or her requirements in dry groceries, and further agrees not to purchase through specialty men, except by consent of the company's president, and also to purchase from the Company, or its authorized packers, manufacturers or wholesalers, his or her requirements in merchandise bearing the [fol. 99] Clover Farm label or brand (second party being under no obligation to purchase any fixed amount), the said Clover Farm Label being Trade Mark registered in the United States Patent Office. The second party agrees to pay for all merchandise purchased from the Company or its authorized distributors on their terms, and any extension of credit beyond their terms shall be a matter of special arrangement with the Company or its distributors, and must be satisfactorily and adequately secured.

The second party agrees not to sell or assign this contract, or the sign except by the written consent of the Company. This Agreement shall continue between the Company and the second party for a period of Two years from the above date and shall automatically renew itself for additional periods of Two years each unless notification to terminate the same is served in writing by either party on

the other at least thirty (30) days prior to the expiration of any term of the contract.

The second party agrees to pay to the Company the sum of One Dollar ($1.00) per week payable in advance during the term of this contract to assist in defraying the cost of printing, postage and office expense necessary in the interest of the second party, and also for the items from "A" to "O" hereinafter mentioned in this contract, there being no membership dues or assessments.

The second party is given the advantage of operating as a Clover Farm Store with the advantages of co-operative purchasing and advertising privileges and modern merchandising methods, advice and instructions in modern store stock arrangement, without requiring the second party to invest capital in other companies or to sell or in any other way part with the control or ownership of his or her business.

[fol. 100] The Company agrees to suggest plans and layout of shelving and fixtures according to modern merchandising standards and to give the second party advice which will enable him or them to operate his or their store in conformity with other stores operated according to The Clover Farm Stores Company standard.

The Company agrees at its own expense to furnish a representative at its headquarters to keep in touch with the second party, advising him or them regarding merchandising methods and to act in the capacity of supervisor, the second party agreeing to follow the instructions generally of the supervisor and to maintain his store in general conformity with the standard required of other members of The Clover Farm Stores Company.

The Company agrees to furnish the second party:

(a) Plans for opening Sale.
(b) One Special Bulletin Monthly.
(c) Collection Department Service.
(d) Plans for Initial Stock Reducing Sale.
(e) Special Window Posters for holiday sales.
(f) Not less than two (2) Window Posters per week.
(g) One complete set of shelf price cards with holders.
(h) One (1) Clover Farm Store News bulletin monthly.
(i) Plans for special merchandising events twice each year.

(j) To assist in securing advertising and other special allowances.

(k) One Instruction Bulletin covering window trim and store display per week.

(l) One (1) copy of printed diagram explaining the scientific arrangement of merchandise for Clover Farm Store.

(m) To assist in arranging for Newspaper advertising, [fol. 101] featuring items sold by second party and other members of The Clover Farm Stores Company.

(n) To assist second party and other members of The Clover Farm Stores Company in the advantageous purchase of merchandise not offered for sale by the Company.

(o) Fifty-two (52) Clover Farm Brand products during each year to be indicated as Competative Items which will be offered to the second party at the Company's cost, plus not to exceed three (3%) per cent, exclusive of cash discount.

This Agreement, as signed, is binding upon the successors, administrators or assigns of each of the parties hereto.

In witness whereof the parties have hereunto set their hands and seals on the day and year above written.

—— ——, First Party. —— ——, Second Party.

Witness: —— ——.

Endorsement: No. —. Clover Farm Store Contract between —— ——, Florida, and —— ——, of ——. Dated —— —, ——.

(Here follow Exhibits 6 and 7 to Amended Bill of Complaint, side folios 102 and 103.)

Home Baking SPECIALS

Take advantage of these low I.G.A. prices to stock your pantry with home baking needs---and save money. On I.G.A. open shelves you'll find everything you need to make baking easier ---and more economical, too.

IGA CAKE FLOUR . . .
IGA BAKING POWDER
Reg. Pkg.
Pound Can
Both for
41c

Eagle Milk
IGA Nut-Oleo
THE WORLD'S BEST
5 Bars Octagon Soap
19c

Sliced
BEETS
IGA
No. 2 Cans
10c

IGA PLAIN OR SELF-RISING
Flour 5 lbs. 19c-12 lbs. 42c-24 lbs. 75c

IGA COCOANUT 15c

Find everything you need to make baking easier ---and more economical, too.

IGA CAKE FLOUR . . . Reg. Pkg.
IGA BAKING POWDER Pound Can / Both for **41c**

Eagle Milk
IGA Nut-Oleo
THE WORLD'S BEST
5 Bars Octagon Soap **19c**

Sliced
BEETS
IGA
No. 2 Cans **10c**

IGA PLAIN OR SELF-RISING
Flour 5 lbs. 19c-12 lbs. 42c-24 lbs. 75c

IGA EXTRACTS 2-OZ. BOTTLE—ABSOLUTELY PURE **20c**

IGA COCONUT 15c
4-OZ. TOY PAIL

SALT, Round Package . . . 8c

PORK & BEANS, IGA, Per Can 5c

CRISCO 3 Pound Can **57c**
FOR HOMES THAT WANT THE BEST IN COOKING

CORN STARCH
IGA SPICES . . 9c

TALL CAN
SALMON 10c

PEACHES, IGA, Y. C. Fancy Table No. 2½ can 18c

IGA COCOA 1-LB. CAN **25c**

SNOWDRIFT 3 POUND PAIL **45c**

PREMIUM
CHOCOLATE ½-LB. PKG. **25c**

COMPOUND
LARD, 3 lbs. . . 25c

SHAVERS
GRAPEFRUIT JUICE . . . . 4-OZ. CAN **5c**

EVAP. PEACHES 2 POUNDS **25c**

MILK, IGA, Tall Cans, 3 for 20c

PURE PORK SAUSAGE, lb. 19c
COUNTRY SMOKED SAUSAGE lb. . . . 12½c

Selox 2 for 25c
GIANT SIZE

Oxydol 3 for 25c
QUICK RICH SUD

TUESDAY, OCTOBER 27th, ONECO, FLORIDA

The Big IGA Home Town Jubilee, an old-fashioned field day. Games, races, plenty of fun and eats is given you FREE by your IGA Stores in appreciation of your past patronage. Join the crowd at Oneco and have a grand, good time at our expense. Ask your IGA grocer about the valuable prizes. Everybody invited.

HOME OWNED
I.G.A. STORES

Brooms
5 STRING
Painted handle
50c VALUE
21¢

IGA
PORK & BEANS
Regular Size
5¢ can

Announcing The National IGA Stores CASH PLAN.

In accordance with our national policy of continually effecting economies in every possible way, in our constant obligation to offer the consuming public the highest quality foods at the lowest possible prices, we are adopting the "STRICTLY SELF SERVE CASH AND CARRY" plan of operation.

Sasser's Grocery & Meats	Enterprise Market
315 So. Ft. Harrison Ave.	619 Cleveland St.

FREE—3 Big Food Demonstrations—FREE
Coffee, Sandwiches & Cakes Served All day. Come to our party and SAVE with our New Cash plan and New Low prices.

FANCY WHOLE GRAIN **RICE** — 5 POUNDS — 17c

CAN **TOMATO JUICE** 5c	CAMPBELL'S CAN **TOMATO SOUP** 7 1-2c
IGA 1 LB. CAN **BAKING POWDERS** 21c	IGA **CATSUP, Lge. Bottle** 10c
IGA PINTS **SALAD DRESSING** 19c	IGA OLD FASHIONED ½ PINT **RELISH SPREAD** ..12 1-2c

IGA **MILK** — 6 Small or 3 Tall Cans — 18c

IGA **TOMATOES** — NEW SOLID PACK 3 No. 2 Cans — 22c

IGA **COFFEE** — I BLEND 29c — G. BLEND 24c — A BLEND 19c

IGA 2 FOR **PANCAKE FLOUR** 19c	IGA 22 OZ. BOTTLE **SYRUP, maple & cane** 23c
6—5c PKGS. **MATCHES** 15c	IGA or P. & G. 3 FOR **SOAP & POWDERS** 10c
IGA 20 OZ. **ROLLED OATS** 8c	IGA PKG. **CORN FLAKES** 5c

IGA SPAGHETTI **MACARONI—NOODLES** — SPECIAL 2 Pkgs. — 11c

IGA HIGHEST QUALITY **FLOUR** — 12 LBS. 42c — 24 LBS. 75c

TALL PINK **SALMON. Can** 10c	ARMOUR'S CAN **CORNED BEEF** 15c

KEW-BEE Supreme Loaf
Practical Sliced Bread
Split Top Supreme Quality
10c

SWIFT'S PREMIUM LB. **HAMS, 1-2 or whole** .. 19c	COMPOUND **LARD, 2 Lbs.** 15c
WESTERN LB. **PORK CHOPS** 17 1-2c	IGA BEST QUALITY Country Roll **BUTTER Lb.** 37c
FANCY WESTERN ANY CUT **STEAKS, Lb.** 25c	FANCY WESTERN **POT ROASTS, Lb.** 17c
YORK COOKING **APPLES, 5 Lbs.** 17c	LARGE ICEBURG **LETTUCE. 2 For** 15c
LARGE IRISH **POTATOES, 10 Lbs.** .. 17c	FANCY YELLOW **BANANAS Doz.** 10c
FRESH DRESSED CHICKENS **HENS .25c—FRYERS .29c**	IGA SMOKED **BACON, Lb.** 15c

WE DELIVER ORDERS OF $2.00 OR MORE

[fol. 104] IN CIRCUIT COURT OF LEON COUNTY

[Title omitted]

MOTION TO DISMISS—Filed Nov. 12, 1931

The defendants, Ernest Amos, as Comptroller of the State of Florida, R. B. Council, as Tax Collector of Leon County, Florida, and R. F. Bowden, as Tax Collector of Duval County, Florida, moves the Court to dismiss the amended bill of complaint, because:

First. There is no equity in the amended bill of complaint.

Second. The amended bill of complaint does not make or state a sufficient cause of action to entitle the complainant to the relief sought.

[fol. 105] Third. The amendments to the bill of complaint do not add any ground for equitable relief.

Fourth. Chapter 15624, Laws of Florida, Acts of 1931, was duly enacted in accordance with the requirements of the Constitution of the State of Florida.

Fifth. Chapter 15624, Acts of 1931, does not deny to the complainants the equal protection of the laws.

Sixth. Chapter 15624, Acts of 1931, does not impose a burden on interstate commerce.

Seventh. Chapter 15624, Acts of 1931, levies an excise tax for revenue purposes, and is within the power and discretion of the Legis-ture to enact, and does not exceed the constitutional limitations or restrictions in such matters.

Eighth. The amended bill of complaint alleges conclusions of law wholly insufficient in a court of equity to authorize the granting of the relief prayed.

Ninth. The classification of stores made for taxation purposes under the provisions of Chapter 15624, Acts of 1931, is reasonable and operates equally and uniformly on all stores similarly situated.

Tenth. The Legislature of Florida has unlimited power and discretion in the matter of levying excise taxes, except that such taxes shall be geographically equal and uniform,

and the taxes levied and imposed by Chapter 15624, Acts of 1931, are geographically equal and uniform.

[fol. 106] Eleventh. The taxes levied and imposed by Chapter 15624, Acts of 1931, do not violate or transcend any provision of either the State or Federal Constitution.

Respectfully submitted.

Cary D. Landis, Cary D. Landis, Attorney General; H. E. Carter, H. E. Carter, Assistant Attorney General, Solicitors for Defendants.

[fol. 107] In Circuit Court of Leon County

[Title omitted]

Affidavit of G. D. Wood—Filed Oct. 19, 1931

State of Florida,
County of Duval, ss:

On this day personally appeared before me, G. D. Wood, who, being by me first duly sworn, says that he is Secretary-Treasurer of Independent Furniture Company, Inc., a Florida corporation, doing business in Duval County, Florida. Affiant further says that his Company has intended to file petition of intervention in said cause. That after the same had been prepared and signed by his attorney affiant was informed by the Tax Collector of Duval County, one of the [fol. 108] defendants in said cause, that said Tax Collector would accept from affiant's said Company payment of license fees on its furniture business on the basis of the old license act, and accordingly affiant, for his said Company paid said tax collector license fees for the years 1931-32 on the basis of the Act in force prior to 1931, and received licenses covering said businesses. Affiant further says that the kind of business, and the places where conducted, and the manner of conducting business by this affiant's said Company are all set forth in draft of petition for intervention prepared for filing in said cause, copy of which is hereto attached and made a part of this affidavit. That said petition is true in substance and in fact in all respects save and except paragraph VII thereof setting up tender to the

Tax Collector and refusal. That, as before stated, after said petition was prepared, the Tax Collector changed his mind, at least accepted payment of license fees on the old basis, as above stated.

G. D. Wood.

Sworn to and subscribed before me this October 8, A. D. 1931. A. B. Weil, Notary Public, State of Florida at Large. (Notarial Seal.)

[fol. 109] Exhibit 1 to Affidavit of G. D. Wood

In Circuit Court of Leon County

Louis K. Liggett Company, a Corporation, and Winn & Lovett Grocery Company, a Corporation, Complainants,

vs.

Ernest Amos, as Comptroller of the State of Florida, R. B. Council, as Tax Collector of Leon County, Florida, and R. F. Bowden, as Tax Collector of Duval County, Florida, Defendants

Petition for Intervention.

To one of the Honorable Judges of the above-styled Court, in chancery sitting:

Comes now Independent Furniture Company, Inc., a Corporation organized and existing under and by virtue of the laws of the State of Florida, with its office and principal place of business in Jacksonville, Florida, and prays leave to intervene in said cause, on account of its interest in the subject-matter as hereinafter set forth. And in this behalf petitioner would show:

[fol. 110] I

It hereby adopts the averments of the original bill of complaint filed in said cause, pointing out sundry discriminations against multiple store operators created by Chapter 15624 Laws of Florida, 1931, to the same extent as if the petitioner had been named as one of the original complainants in said bill, and this petitioner hereby claims the pro-

tection of secs. 1, 4 and 12 of the Declaration of Rights of the Florida Constitution, and of the "due process" clause and the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution, upon the same grounds and for the same reasons as claimed on behalf of the complainants in said bill.

II

Your petitioner would further show that it was organized in the year 1924, with a capital stock of Twenty-five Thousand ($25,000.00) Dollars, consisting of 250 shares of the par value of $100.00 each. That the officers of your petitioner are as follows:

E. R. Spence, President, owning 125 shares, residing at Jacksonville, Florida;

Z. C. Carter, Vice-President, owning 1 share, residing at Live Oak, Florida;

G. D. Wood, Secretary-Treasurer, owning 124 shares, residing at Jacksonville, Florida.

That E. R. Spence, President of your petitioner, has been a citizen and resident of Jacksonville for the past fifteen years; and G. D. Wood, Secretary-Treasurer of your petitioner, has likewise been a citizen and resident of Jacksonville for the past fifteen years.

[fol. 111] III

That this petitioner, Independent Furniture Company, Inc., owns and operates three retail furniture stores and two warehouses in Duval County, Florida, situated as follows:

Retail Stores:

One retail store located at 915 Kings Road, Jacksonville;

One retail store at Florida Avenue and Jessie Street, Jacksonville;

One retail store at Atlantic Boulevard and Kings Road, South Jacksonville, Florida.

Warehouses:

One warehouse located at 21st and Davis Streets, in the City of Jacksonville, Fla.

One warehouse located at 904 Kings Road, in the City of Jacksonville, Florida.

That the merchandise handled and sold by petitioner through said stores consists of household furniture and house furnishings, principally living room suites, dining room suites, bed room suites, stoves, floor coverings, rugs, linoleums and the like, window shades, etc., etc. That petitioner conducts its said furniture business through said retail stores and warehouses in substantially the same manner that other retail furniture dealers conduct their business in the same localities, except that this petitioner's business is not near so large as some of the others, and this petitioner relies more upon personal solicitation of the trade, than upon advertising.

IV

This petitioner would further show that it buys its goods from factories situated in different parts of the United [fol. 112] States on 30, 60 and 90 days credit, the same being substantially the same terms of credit allowed to other furniture dealers in Duval County, although such dealers operate single stores, and do a much larger volume of business. That your petitioner sells goods on the installment plan, approximately 95% of its sales being made on that basis, the usual terms of sale being 10% cash as down payment, 2% of the amount of the bill per week if paid weekly, or 8% of the amount of the bill per month if paid monthly. That your petitioner seeks to avoid carrying a large stock in warehouse, but endeavors to ascertain the demands of the particular communities in which its retail stores are located, and seeks to increase its volume of business through the use of solicitors.

V

Your petitioner would further show that there are a number of large retail furniture dealers doing business in the City of Jacksonville, Florida, owning and operating single stores, but who severally do a much larger volume of retail business than is done by your petitioner in all three of its said retail stores and two warehouse- combined. That

the Rhodes-Futch-Collins Furniture Company does approximately three times as much business as your petitioner; the Jones Furniture Company does approximately five times the volume of business; the Chadwick Furniture Company approximately five times as much; The Standard Furniture Company approximately five times as much; and the Haverty Furniture Company approximately five times as much. That although said single store furniture dealers each do more business than your Petitioner they are charge-[fol. 113] able with an arbitrary State license fee under said Act of 1931 with only $5.00 each; whereas your petitioner for its said three retail stores is chargeable with $5.00 for one store, and $10.00 for each of the two additional stores, making an arbitrary state license fee on petitioner's said three retail stores of $25.00. That in addition to said arbitrary State license fee, your petitioner will under said Act be required to pay $3.00 per $1,000.00 upon the value of the entire stock carried in said three retail stores, plus the stock in the warehouses, for a State license, and when the amount of the State license is so arrived at, there must then be added 25% thereof for County license and 25% additional for municipal license, unless otherwise controlled by the charter of the City of Jacksonville. Thus in sundry ways the license burdens imposed upon your petitioner's said business are many times greater than the license burdens imposed upon a similar business of similar size if done at one location or under one roof.

VI

Your petitioner would further show that the arbitrary classifications made by the Act of 1931, as pointed out in said bill of complaint, particularly in sec. II thereof, are unreasonable, and without any proper foundation as applied to petitioner's business conducted through its three retail stores and two warehouses, all in Duval County, Florida, as aforesaid. That no reason exists why it should pay a higher license tax on account of the mere fact that it does a retail business in more than one location. That the excessive and unequal burdens of license tax which will apply to petitioner's business, if said Act of 1931 is enforced, will deprive this petitioner of its property without due process of law, and deprive this petitioner of the equal

protection of the laws contrary to the Declaration of [fol. 114] Rights of the Florida Constitution, and contrary to the "due process" clause and the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution.

VII

Your Petitioner would further show that it has tendered to the Tax Collector of Duval County, Florida, the State and County license chargeable under the old law existing prior to the Act of 1931, but said Tax Collector, acting under instructions of the Comptroller of the State of Florida, and pursuant to the provisions of said Act of 1931, has refused to accept the same, and has refused to issue a license to this Petitioner on account of the provisions of said Act of 1931. That unless the Court's writ of injunction is granted against the said Tax Collector of Duval County this Petitioner will be subjected to the penalties provided for by said Act, and its said business will be put in great jeopardy.

Wherefore your petitioner prays that the Court may allow this petition of intervention, and will grant to this petitioner the same relief against the enforcement of said Act which is prayed for in the aforesaid bill of complaint, to the same extent as if it had been one of the original complainants.

Independent Furniture Company, Inc., by —— ——, President. Gov. Hutchinson, Attorney for Intervenor.

[fol. 115] In Circuit Court of Leon County

[Title omitted]

Order Allowing Intervention of Southern Stores Corp. et al.—Nov. 12, 1931

This cause came on further to be heard, after due notice and was argued by counsel for the respective parties, and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed as follows:

That the petitions of Southern Stores Corporation, a Corporation, Nunnally Company, a Corporation, and Mel-

ville Shoe Corporation, a corporation, be and the same *the same* are hereby granted and said petitioners, respectively be and they are hereby allowed to intervene and are made parties to this cause.

Done and Ordered at Chambers, at Quincy, Florida, this November 12th, 1931.

E. C. Love, Circuit Judge.

[fol. 116] In Circuit Court of Leon County

[Title omitted]

Petition of Intervention—Filed Nov. 12, 1931

To one of the Honorable Judges of the above-styled Court, in chancery sitting:

Comes now The Nunnally Company, a Corporation organized and existing under and by virtue of the laws of the State of Delaware, having an office and place of business in Jacksonville, Florida, and prays leave to intervene [fol. 117] in said cause, on account of its interest in the subject-matter as hereinafter set forth. And in this behalf petitioner would show:

I

It hereby adopts the averments of the amended bill of complaint filed in said cause, pointing out sundry discriminations against multiple store operators created by Chapter 15624, Laws of Florida, 1931, to the same extent as if the petitioner had been named one of the original complainants in said bill, and this petitioner hereby claims the protection of sec. 1, 4 and 12 of the Declaration of Rights of the Florida Constitution, and of the "due process" clause and the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution, and of the Commerce Clause of the Federal Constitution, upon the same grounds and for the same reasons as claimed on behalf of the complainants in said amended bill.

II

That this Petitioner owns and operates four retail stores in the State of Florida, distributed as follows: Duval

County, two, Dade County, two. That the merchandise sold in each of said stores consists of candies, soda-water and luncheons. That this petitioner conducts its stores in the same manner as other candy, soda-water and luncheon establishments are conducted in their said several localities, attempting, however, to give the public a better service than is given by other merchants doing the same sort of business, and attempting to give the customers of this petitioner better values for their money—all of which efforts on the part of this petitioner are mere matters of competitive merchandising.

III

Petitioner would further show that it carries a compara- [fol. 118] tively small stock of goods in each of the 4 Florida stores, shipping to said stores from its candy factory in Georgia all of the confectioneries sold in these stores and purchasing from local merchants and from factories situated in different parts of the country the merchandise sold over its soda fountains and served in its restaurants. That in order to keep its stock of candies, etc, carried in its said Florida retail stores fresh and attractive to the retail trade petitioner makes frequent interstate shipments to said stores from its Georgia factory upon periodical interstate requisitions therefor, sent by mail, wire or telephone, from petitioner's managers of said Florida stores. That petitioner buys its other merchandise on substantially the same terms as merchandise is bought by other merchants doing business in different parts of the State, whether such merchants operate single or multiple stores. That for the most part petitioner purchases merchandise on terms of thirty days payments, and the same terms are available to petitioner's competitors who are in good financial standing. That your petitioner does not do extensive advertising of its several businesses—that due to the fact that petitioners' stores are widely scattered any advertising in one town where a store is located would be of little value as advertising in other towns where other stores are located. The petitioner's business in each town where its store or stores are operated has been built up by the energy and effort of petitioner's officers and individual managers employed to conduct such stores.

IV

Petitioner would further show that the arbitrary classifications made by the Act of 1931, as pointed out in said amended bill of complaint, particularly in sec. VII thereof, are unreasonable, and without any proper foundation as [fol. 119] applied to this petitioner's business conducted through four stores situated in different parts of Florida, as aforesaid. That no reason exists why it should pay a higher license than paid by four individual store owners doing a like and equal business to that done by your petitioners. That no reason exists for so greatly increasing petitioner's burden upon four stores simply because they are operated in more than one County, rather than in a single County. That the excessive burdens of license fees imposed by said Act, as pointed out in said Amended Bill, applied to this petitioner's business, carried on as aforesaid, deprive this petitioner of its property without due process of law, and deprive this petitioner of the equal protection of the laws, contrary to the Declaration of Rights of the Florida Constitution, and contrary to the "due process" clause and the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution, and will impose burdens on the inter-state characteristics of petitioner's business, as aforesaid, contrary to the commerce clause of the Federal Constitution.

V

Petitioner would further show that it has tendered to the Tax Collectors of Duval County and Dade County the State and County licenses chargeable under the old law existing prior to the Act of 1931, but said Tax Collectors severally, acting under instructions from the Comptroller of the State of Florida, and pursuant to the provisions of said Act, 1931, have refused to accept the same, and have refused to issue licenses to this petitioner on account of the provisions of said Act of 1931, requiring that upon compliance with its provisions such licenses be issued only by the Comptroller of the State of Florida. That the defendant Ernest Amos, Comptroller of the State of Florida, has prepared and distributed to the merchants throughout the State a form of [fol. 120] return for assessment of occupational license taxes on stores operated by multiple owners, on the back of

which there appears information and instructions as to said Chapter 15624 Laws of Florida, 1931, a copy of said form so distributed, is hereto attached, marked Exhibit 1, and made a part of this petition. That the said form together with the information contained on the back thereof, constitute the defendant Comptroller's construction and interpretation of said Act, and shows the manner in which he proposed to enforce the same as against multiple store owners operating in a single county, or operating in more than one county in the State of Florida. That on to-wit, November 6, 1931, this petitioner received from the Honorable Ernest Amos, Comptroller, a communication dated October 31, 1931, in words and figures following, to-wit:

"State of Florida, Comptroller's Office, Tallahassee

Ernest Amos, Comptroller

October 31, 1931.

Re Occupational License under Chapter 15624, Acts of 1931

Nunnally's Co., Atlanta, Ga.

DEAR SIR: Your application for license, as required by the above Act, has not been received and you are hereby notified that unless same is received at this office on or before November 10, 1931, a penalty of twenty-five per cent (25%) will be imposed, as provided under Section 4.
[fols. 121 & 122] Please forward your application promptly on the enclosed blank.

Yours very truly, Ernest Amos, Comptroller.

JCC/j.
Enclosures."

That unless the Court's writ of injunction is granted against the said defendant in said suit, that is to say the Comptroller, and the Tax Collector of Duval County, this intervenor will be subjected to the penalties provided for by said Act and its said businesses, particularly those located in Duval County, will be in great Jeopardy.

Wherefore your petitioners prays that the Court may allow this petition of intervention, and will grant to this petitioner the same relief against the enforcement of said

Act which is prayed for in the aforesaid amended bill of complaint to the same extent as if it had been one of the original complainants.

The Nunnally Company, by T. M. Swift, Store Manager. Thos. B. Adams, A. L. Layton, Attorneys for Intervenor.

Duly sworn to by T. M. Swift. Jurat omitted in printing.

(Here follows Exhibit No. 1 to Petition of Intervention, side folios 123 and 123½.)

EXHIBIT NO. 8 - TO PETITION OF INTERVENTION 123

STATE OF FLORIDA

STATE OF FLORIDA

Occupational License Tax on Stores

No.....

To ....., 193.....
Hon. Ernest Amos,
Comptroller, State of Florida,
Tallahassee.

.....of .....
hereby makes application for license to operate stores in the State of Florida under the provisions of Chapter 15624, Acts of 1931, as follows:

NAME OF STORE	LOCATION OF EACH STORE			Full Actual Value of Stock of Merchandise in Each Store or in Storage
	County	City	Street and Number	

Information on the Law:

When to apply to the Tax Collector

Where the store or stores are located in one county, apply to the County Tax Collector for the license.

When to apply to the Comptroller

Where stores are located in more than one county, apply to the Comptroller, Tallahassee, Florida, for licenses.

The name of the owner, manager, trustee, lessee, receiver or other person desiring such license; the name of such store, the location, including the street number of such store, and the full actual value of the stock of goods, wares, merchandise and commodities owned by the applicant and held in storage to be sold in or through such store must be given. Such application shall be under oath.

ANNUAL LICENSE TAXES ARE AS FOLLOWS:

(1) On one store, Five dollars and $3.00 per $1,000.00 value of stock in store and storage.

(2) On two or more stores, but not over fifteen, located in one county, Ten Dollars for each additional store and $3.00 per $1,000.00 value of stock in store and storage.

(3) On two or more stores, but not over fifteen, located in more than one county, Fifteen Dollars for each additional store and $3.00 per $1,000.00 value of stock in store and storage.

(4) On each store in excess of fifteen, but not over thirty, located in one county, Fifteen Dollars for each additional store and $3.00 per $1,000.00 value of stock in store and storage.

(5) On each store in excess of fifteen, but not over thirty, located in more than one county, Twenty Dollars for each additional store and $3.00 per $1,000.00 value of stock in store and storage.

(6) On each store in excess of thirty, but not over fifty, located in one county, Twenty Dollars for each additional store and $3.00 per $1,000.00 value of stock in store and storage.

(7) On each store in excess of thirty, but not over fifty, located in more than one county, Thirty Dollars for each additional store and $3.00 per $1,000.00 value of stock in store and storage.

(8) On each store in excess of fifty, but not over seventy-five, located in one county, Thirty Dollars for each additional store and $3.00 per $1,000.00 value of stock in store and storage.

(9) On each store in excess of fifty, but not over seventy-five, located in more than one county, Forty Dollars for each additional store and $3.00 per $1,000.00 value of stock in store and storage.

(10) On each store in excess of seventy-five, located in one county, Forty Dollars for each additional store and $3.00 per $1,000.00 stock in store and storage.

(11) On each store in excess of seventy-five, located in more than one county, Fifty Dollars for each additional store and $3.00 per $1,000.00 value of stock in store and storage.

A COUNTY LICENSE TAX OF TWENTY-FIVE (25%) PER CENT OF THE STATE LICENSE TAX IS IMPOSED ON EACH STORE AS HEREIN DEFINED AND A LIKE AMOUNT FOR EACH INCORPORATED MUNICIPALITY IN WHICH STORES ARE LOCATED, GRADUATED BY THE NUMBER OF STORES IN THE COUNTY OR MUNICIPALITY, ALSO A FEE OF 50c IS REQUIRED FOR EACH LICENSE ISSUED.

All licenses are due and payable on the first day of October of each year and if not paid by the 31st day of October, a penalty of 25% must be imposed.

Full annual rate required to be collected from September 30th to March 31st; half annual rate April 1st to October 1st.

After receiving application for licenses the Comptroller will render to each person, firm, corporation, association or co-partnership making such application, an itemized bill showing the total amount of license taxes due.

Filling stations engaged exclusively in the sale of gasoline and other petroleum products and tire and tube dealers are not subject to this tax.

ERNEST AMOS, Comptroller,
State of Florida,
Tallahassee.

[fol. 124] IN CIRCUIT COURT OF LEON COUNTY

[Title omitted]

PETITION OF INTERVENTION—Filed Nov. 12, 1931

To one of the Honorable Judges of said Court, in chancery sitting:

Come now Mellville Shoe Corporation, a corporation organized and existing under the laws of the State of New York, G. R. Kinney Shoe Company, a corporation organized and existing under the laws of the State of Delaware, J. C. Penney Company, a corporation organized and existing under the laws of the State of Delaware, F. W. Woolworth Company, a corporation organized and existing under the laws of the State of New York, Montgomery Ward & Com-
[fol. 125] pany, a Corporation, and The Great Atlantic & Pacific Tea Company, a Corporation organized and existing under the laws of the State of Arizona, United Cigar Stores Company of America, a corporation organized and existing under the laws of the State of New Jersey, and pray leave to intervene in said cause on account of their several interests in the subject matter as hereinafter set forth. And in this behalf your Petitioners would show:

I

That your petitioners severally own and operate retail stores of the kind, and situated at different points in Florida, as more particularly hereinafter shown, by reason whereof your petitioners severally are materially and vitally affected by the provisions of Chapter 15624, Laws of Florida, 1931, complained of in the amended bill filed, or to be filed in said cause, as now proposed for hearing set before said Honorable Court on November 12, 1931.

II

That your petitioners severally hereby adopt the averments of the amended bill of complaint filed or to be filed in said cause, pointing out discriminations against multiple or chain store operators, created by Chapter 15624, Laws of Florida, 1931, to the same extent as if your petitioners severally had been named as original complainants in said amended bill. That your petitioners severally hereby claim

the protection of sec. 8, art. IV, and sections 1, 4 and 12 of the Declaration of Rights of the Florida Constitution, and the "due process" clause and the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution, and of the "commerce clause" of the Federal Constitution, upon the same grounds and for the same reasons as claimed on behalf of the complainants in said amended bill.

[fol. 126] III

That your petitioner F. W. Woolworth Company operates seventeen retail stores in different counties of the State of Florida. That this petitioner in each of its said retail stores carries and sells a great variety of articles usually and commonly carried in what is known as "5 and 10 cent stores." That the business of your petitioner had its beginning more than a quarter of a century ago with a single store, which business was gradually enlarged by the opening up of additional stores until now this petitioner owns and operates stores in many States, including the seventeen stores in Florida, as aforesaid. That your petitioner's trade is attracted by novelties of many kinds, also house furnishings, crockery ware, light hardware, toys, candies, etc. That in order for petitioner to keep its stocks supplied in said Florida stores it is necessary to make frequent shipments thereto from points in other States upon interstate requisitions made by the several managers of said Florida stores.

V

That your petitioner Mellville Shoe Corporation owns and operates in the State of Florida seven retail shoe [fol. 127] stores in the State of Florida, situated as follows:

Duval County	2
Dade County	1
Escambia County	1
Polk County	1
Hillsborough County	2

That this petitioner owns and operates retail shoe stores in many other States of the United States. This petitioner avers that the manner in which it conducts its said shoe

business in said Florida stores is substantially the same as that used by Paxson's Inc. described in the amended bill filed, or to be filed in said cause.

VI

That your petitioner G. R. Kinney Shoe Company owns and operates in the State of Florida four retail shoe stores, situated as follows:

Duval County	1
Orange County	1
Hillsborough County	2

That your petitioner also owns and operates shoe stores in many other States of the United States. Petitioner avers that the manner in which it conducts its business in said Florida retail stores is substantially the same as that described for and on behalf of Paxson's Inc. as set forth in the amended bill of complaint filed or to be filed in said cause.

VII

That your petitioner J. C. Penney Company owns and operates in the State of Florida three retail department stores situated as follows:

Columbia County	1
Putnam County	1
Seminole County	1

[fol. 128] That this petitioner owns and operates several hundred stores throughout the United States, but only three in Florida, situated as aforesaid. That the business of this petitioner was started more than a quarter of a century ago by J. C. Penney, whose name it bears, with one country store. That the uniform policy of this petitioner for many years has been to use its trained employees for the opening of new stores as managers thereof, and to permit each such new manager to acquire a certain per centage of stock in the Company, which will represent a very substantial portion of capital invested in the new store of which he is to be manager, contemplating that such new manager will acquire a home and become affiliated with the people of the community where such new

store is located; and under that arrangement, which has been pursued for many years, the several managers of the several stores of this petitioner, receive a substantial share of the profits made by the several stores of which they severally are managers. That this petitioner selects for its places of business towns of moderate size, where its stores, carrying high grade merchandise, wearing apparel, and goods usually found in a small department store will be accessible to farmers, laborers and other classes of working people, who have limited means, and desire to avail themselves of the opportunity to buy standard goods at low prices. Pursuing that policy, this petitioner located its three Florida stores, as aforesaid, rather than in the large cities of the State, such as Jacksonville, Tampa and Miami.

VIII

That your petitioner, Montgomery Ward & Company has for many years been, and still is, a large mail order house, with its headquarters in Chicago, Illinois, selling goods by [fol. 129] catalogue, by mail or express deliveries throughout the United States. That within the last few years it has opened a number of retail stores in different parts of the United States, and has opened one such retail store in Florida, situated in Manatee County. That said store in Manatee County is the only store which this petitioner owns and operates within the State of Florida. That it carries in said store a large assortment of general merchandise such as is usually found in a small department store, wearing apparel, household furnishings, kitchen utensils, hardware, farming implements, automobile tires and tubes, radios and the like. That it conducts its said business in Manatee County in substantially the same manner as any other similar store is conducted in that part or any other part of the State of Florida.

X

That your petitioner, The Great Atlantic & Pacific Tea Company, owns and operates 226 retail grocery stores scattered throughout the State of Florida in the several counties thereof. That this petitioner also owns and operates in the City of Jacksonville, Florida, a large warehouse, from

which it supplies merchandise to its retail store units in different parts of the State of Florida. That the retail grocery stores operated by this petitioner are of the same kind, and carry substantially the same classes of goods, and conducted in substantially the same manner as other grocery stores operated by its competitors in various parts of the State of Florida, examples of which are shown by the amended bill of complaint filed in said cause. That on page 13 of exhibit 4 attached to said amended bill of complaint is an advertisement of goods offered for sale by this petitioner in its retail grocery stores situated in the City of Jacksonville, Florida, and the goods listed in said advertisement, and the prices thereof, when compared with similar [fol. 130] goods offered by the Better Food Stores and the Whiddon Grocery Stores, and other grocery stores operated in the City of Jacksonville, as shown by the amended bill filed in said cause, show that this petitioner has very keen competition in the grocery business. That the competition encountered by this petitioner in the City of Jacksonville exists in all other localities in the State of Florida where this petitioner owns and operates stores. That the rapid expansion in the number of stores operated by this petitioner and other grocery concerns in the State of Florida, and elsewhere, during the last decade has been largely caused by the economic changes set forth in said amended bill of complaint, among which are the increased use of automobiles for shopping purposes, the congestion in the old trading centers of such cities as Jacksonville, Florida, and the establishment of a great number of subtrading centers in suburban districts, widely scattered, and convenient to the automobile trading customers. That the clipping from the classified city directory of the City of Jacksonville, Florida, for August, 1931, attached to the amended bill of complaint as exhibit 3, shows how widely distributed are the subtrading centers of the City of Jacksonville, and those sub-trading centers for the most part have been established during the last ten years.

And this petitioner would further show that its business began with one store in the year 1859, and has gradually grown until now it owns and operates more than 15,000 retail grocery stores, distributed throughout the United States from the Atlantic to the Pacific. That its business in Flor-

ida and other States constitutes a national unit of commerce and exchange of food commodities. That throughout the seventy-two years of its business development this petitioner has pursued a uniform policy of bringing about an exchange of food products as directly from the producer to [fol. 131] the consumer as possible, with the least amount of economic waste. That this petitioner annually buys in Florida millions of dollars worth of citrus fruits, canned grapefruit, irish potatoes, strawberries, fresh vegetables, and other Florida products, from producers and cooperative associations, organized under the laws of the State of Florida, which products for the most part are thereafter distributed in interstate commerce and sold through their respective retail stores distributed throughout the United States. That this petitioner also through its store managers in charge of its Florida stores, buy- in Florida many thousand cases of eggs from farmers, and wherever a surplus supply occurs over the local demand, such surplus is moved in interstate commerce to other States where the demand is greater and there sold through this petitioner's retail stores in such other States. That in like manner this petitioner buys very large quantities of foods and food products in other States, from meat packing houses, fruit and vegetable canners, creameries, flour mills, sugar refineries, and from all sources of food supply, and in like manner distributes the same through its retail stores distributed throughout the United States, including its Florida retail stores, upon interstate requisitions received regularly from the store managers of its Florida retail stores and its retail stores in other States. That this petitioner's Florida warehouse, situated at Jacksonville, Florida, and its retail grocery stores situated in various parts of Florida, and its similar warehouses and retail stores situated in other States, are mere temporary depots for the handling and distribution of the great current of interstate commerce in food products carried on by this petitioner, as aforesaid. That its warehouse at Jacksonville, Florida, and similar warehouses in other States, are merely points for breaking bulk in shipments arriving at such warehouse from other States, and from which warehouses small shipments are forwarded weekly, or more often if needed, by motor truck [fol. 132] or rail transportation, to this petitioner's re-

tail stores situated in different parts of Florida and other States, as the case may be. That the same means of transportation which carry food supplies to such retail stores also bring back to such warehouses surplus supplies of eggs and other commodities purchased from producers by petitioner's retail store managers in the respective localities where retail stores are situated, and the surplus supply of eggs and other such products, so collected and brought back to the warehouses, are then combined and forwarded in bulk shipment to other States. That in order to carry on the very large business of this petitioner, as aforesaid, it is necessary to buy in large quantities, and it is necessary to move same first in bulk shipments, and then by broken and smaller shipments for distribution in its retail units, such movements being controlled by interstate requisitions received by mail, or otherwise, from the individual retail store managers. That the method of conducting this petitioner's business by interstate transaction, as aforesaid, is necessary to keep its goods fresh in its retail stores, constantly turning over and attractive to the retail trade. That if there be any distinction between this petitioner's method of doing business, as aforesaid, and the method pursued by individually owned grocery stores, such as those belonging to the Better Food Stores group, or those belonging to the I. G. A organization, as described in the amended bill of complaint, such difference or differences consist chiefly in the interstate characteristics of this petitioner's business, as aforesaid, not present in the business carried on by such individually owned retail grocery stores. That the excessive burdens of license tax sought to be imposed by said Chapter 15624, particularly by secs. 5 and 11 thereof, constitute burdens upon the interstate characteristics of this petitioner's business, as aforesaid, contrary to the commerce clause of the Federal Constitution.

[fol. 133] That, without repetition, this petitioner endorses all of the matters and things set forth in said amended bill of complaint as applies to the retail grocery business carried on in the State of Florida, and further specifically avers that there is no reasonable basis for the arbitrary, oppressive and unreasonable classifications made by said Act, or for the oppressive and discriminatory license fees imposed upon this petitioner by said Act particularly under secs. 5 and 11 thereof.

XI

That your petitioner United States Cigar Stores Company of America owns and operates in the State of Florida eight retail stores situated as follows:

Duval County	2
Dade County	3
Orange County	1
Hillsborough County	1
Palm Beach County	1

That — each of said retail stores your petitioner sells cigars, tobaccos, smokers' supplies, candies, soda water, ice cream, and other like commodities at retail. That your petitioner does not operate or maintain any warehouse in the State of Florida, but that all of the cigars, tobaccos and other like commodities handled through its retail stores located in the State of Florida, as aforesaid, are shipped either direct from manufacturers, or from warehouse of your petitioner located outside of the State of Florida, in substantially the same manner that such supplies are obtained by single owned stores doing a like business. That in order to keep its Florida stores supplied with fresh stock it makes frequent shipments from points in other States to its said [fol. 134] Florida Stores upon interstate requisitions made by the several managers of its said Florida stores. That in its operations your petitioner competes with drug stores, other cigar and tobacco stores, and other classes of stores handling cigars, tobaccos and other like commodities to those handled by your petitioner in its eight Florida stores located as aforesaid.

XII

That your petitioners severally have tendered to the tax collectors of the several counties where their several businesses are situated, as aforesaid, the state and county license taxes chargeable under the old license Act, that is to say sec. 926 Revised General Statutes of Florida, and other sections of the license statute of this State in force prior to said Act of 1931, but the said Tax Collectors of the Counties where said businesses are located, as aforesaid, have severally declined to accept payment of license fees under said Act, and, acting upon instructions from the Honorable

Ernest Amos, Comptroller of the State of Florida, have demanded that these petitioners severally procure licenses from the State Comptroller in manner and form as provided by said Act of 1931. That the said Comptroller, acting in conjunction with said Tax Collectors of the several Counties where these petitioners severally do business, as aforesaid, is threatening to cause penalties to be imposed upon these petitioners severally by way of a 25% additional tax, as provided in sec. 4 of said Act, and by way of criminal prosecutions, as provided in sec. 9 of said Act, if these petitioners severally do not make application for licenses and pay the excessive and arbitrary fees provided for by said Act.

[fols. 135 & 136] That unless the Court's writ of injunction is granted in said cause against the defendant Comptroller, as prayed for in said amended bill, the several businesses of these petitioners located as aforesaid, will be put in great jeopardy, and these petitioners severally will suffer irreparable injury.

Wherefore your petitioners severally pray that the Court may allow this petition of intervention to be filed, and will grant to these petitioners severally the same relief against the enforcement of said Chapter 15624, which is prayed for in and by said amended bill of complaint, to the same extent as if these petitioners severally had been named as complainants in said cause.

Kay, Adams, Ragland & Kurz, Thos. B. Adams,
Attorneys for Intervenors Named in the Introductory Part of This Petition.

Duly sworn to by R. M. Smith. Jurat omitted in printing.

[fol. 137] In Circuit Court of Leon County

[Title omitted]

Petition of Intervention—Filed Nov. 12, 1931

To one of the Honorable Judges of the above-styled Court, in chancery sitting:

Come now Southern Stores Corporation, a corporation organized and existing under the laws of the State of Flor-

ida, having its principal place of business in Miami, Florida, and South Florida Stores Corporation, a corporation organized and existing under and by virtue of the laws of the State of Florida, having its principal office and place of [fol. 138] business in Tampa, Florida, and pray leave to intervene in said cause, on account of their interest in the subject matter as hereinafter set forth, and in this behalf Petitioners respectfully show:

1

Southern Stores Corporation and South Florida Stores Corporation hereby adopt the averments of the Amended Bill of Complaint filed in said cause, pointing out many and sundry discriminations against multiple store operators created under Chapter 15624, Laws of Florida, 1931, the so-called Chain Store Tax Law, to the same extent as if Petitioners had been named as original Complainants in said Bill, and these Petitioners hereby claim the protection of Sections 1, 4 and 12 of the Declaration of Rights of the Florida Constitution, and of the "due process" clause and the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution, and of the Commerce Clause of the Federal Constitution, upon the same grounds and for the same reasons as claimed on behalf of the Complainants in said Amended Bill of Complaint, which said Amended Bill of Complaint to that extent, is adopted by Petitioners herein.

2

Southern Stores Corporation owns and operates 28 retail stores in the State of Florida, distributed as follows:

19 in the County of Dade,
2 in the County of Broward, and
7 in the County of Palm Beach.

Petitioner, South Florida Stores Corporation, operates 21 stores in the State of Florida, distributed as follows:

11 in the County of Hillsborough,
8 in the County of Pinellas, and
2 in the County of Polk.

[fol. 139] Both of these Petitioners conduct their stores along similar lines as other grocery stores conducted in their several localities, attempting however, to give the public a better service than is given by other merchants doing the same sort of business, and attempting to give the customers of these Petitioners better values for their money, but they attempt to do so by good merchandising and by careful and proper attention to the details of their business, which same care to attention and detail might or could be given by other retail merchants who are not subject to the tax which is complained of herein.

3

Petitioners represent that in order to carry on their business successfully in the various counties in which they do business it is necessary for them to maintain advertising campaigns in said various counties, since the advertising carried on in any one particular place or county does not seriously advance the business of Petitioners in other counties in which business is done by your Petitioners.

4

The Southern Stores Corporation, one of the Petitioners herein, is the owner of more than a majority of the stock of South Florida Stores Corporation, the other of the Petitioners herein, but the two said Units (that of the Southern Stores Corporation being referred to in its business as the Miami Unit, and that of South Florida Stores Corporation being referred to as the Tampa Unit), are served by separate warehouses, the warehouses for the so-called Miami Unit being maintained in Miami and West Palm Beach, Florida, and the warehouse for South Florida Stores Corporation being maintained in Tampa, Florida.

[fol. 140] 5

By reason of the facts set forth in the two preceding paragraphs your Petitioners would respectfully show that there are certain groups of grocery stores operated in Dade County, Florida, for instance, which would have and enjoy the benefit of a lower license tax as compared with Southern Stores Corporation although receiving the same benefits under multiple Unit management and operation, for which

reason Petitioners charge that the said Chapter 15624, Laws of Florida, 1931, is discriminatory. Petitioners also represent that the same thing is true with respect to the so-called Tampa Unit of Southern Stores Corporation, since in each case the advertising, overhead expense and other expenses incurred by stores operated in certain counties in the State of Florida obtain no or little benefit by reason of their operation under one management. Particularly Petitioners show that the arbitrary classifications made by the said Act of 1931, as shown in said Amended Bill of Complaint and particularly in Section 7 thereof, are unreasonable and without any proper foundation as applied to these Petitioners' business, and that no reason exists why they should pay a higher license than paid by individual owners doing like and equal business to that done by your Petitioners because they are operating in more than one county rather than in a single county. Further, that the excessive burdens of license fees imposed by said Act, as pointed out in said Amended Bill, applied to these Petitioners' business, deprived these Petitioners of their property without due process of law, and deprived these Petitioners of the equal protection of the law, contrary to the Constitution of the State of Florida and contrary also to the Constitution of the United States.

Petitioners would further show that they have made their [fol. 141] tenders of the State and County licenses chargeable under the laws existing prior to the said Act of 1931, but have been advised by the several Tax Collectors that the same were refused, and were advised to pay the taxes required under the said Act of 1931.

Petitioners further say that unless the Court's Writ of Injunction is granted against Defendants in this suit as well as against the Tax Collectors of all of the counties herein named in which these Petitioners do business, these intervenors may be subjected to the penalties provided for by said Act, and their businesses located in the various counties hereinabove named may be placed in jeopardy.

Wherefore your Petitioners pray that the Court may allow this Petition of Intervention and will grant to these Petitioners the same relief against the enforcement of said Act which is prayed for in the aforesaid Amended Bill of

Complaint, to the same extent as if they had been one of the original Complaints.

Southern Stores Corporation, by Walter O. Marshburn Vice-President; South Florida Stores Corporation, by Walter O. Marshburn, Vice-President, Intervenors. Marshburn, Mendenhall & McDonald, Marshburn, Mendenhall & McDonald, Solicitors for Intervenors.

[fol. 142] *Duly sworn to by Walter O. Marshburn. Jurat omitted in printing.*

[fol. 143] In Circuit Court of Leon County

In Chancery

Louis K. Liggett Company, a Corporation; Winn & Lovett Grocery Company, a Corporation, et al.

vs.

Ernest Amos, as Comptroller of the State of Florida; R. B. Council, as Tax Collector of Leon County, and R. F. Bowden, as Tax Collector of Duval County

Final Decree—Dec. 15, 1931

This cause came on to be heard after due notice and was argued by counsel for the respective parties; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed as follows:

First. That the application of the Complainants for a temporary restraining order as prayed for in the amended bill of complaint be and the same is denied.

Second. That the motions of the defendants to dismiss the amended bill of complaint herein be and the same is hereby granted, and that the said amended bill of complaint be and the same is hereby dismissed.

[fol. 144] Third. That said complainants do pay the costs of this cause, to be taxed by the Clerk of said court.

Done and ordered at Chambers, at Quincy, Florida, this 15th day of December, A. D. 1931.

E. C. Love, Circuit Judge.

[fol. 145] In Circuit Court of Leon County

[Title omitted]

Notice and Entry of Appeal—Filed Dec. 19, 1931

To the said defendants in said cause and to all others whom it may concern:

Notice is hereby given that Louis K. Liggett Company, a Corporation, Winn & Lovett Grocery Company, a Corporation, and Paxson's Inc. a Corporation, Complainants in said cause, and The Nunnally Company, a Corporation, Mellville Shoe Corporation, a Corporation, G. R. Kinney Shoe Company, a Corporation, J. C. Penney Company, a Corporation, F. W. Woolworth Company, a corporation, Montgomery Ward & Company, a corporation, The Great [fol. 146] Atlantic & Pacific Tea Company, a Corporation, United Cigar Stores Company, a Corporation, Southern Stores Corporation, a corporation, and South Florida Stores Corporation, a corporation, Intervenors, severally hereby take and enter this their several appeal from the final decree signed and entered in said cause on the 15th day of December, A. D. 1931, and recorded in Chancery Order Book No. 9, at page 598 of the records of said Court.

That this several appeal from said decree is hereby made returnable to the Supreme Court of Florida on the 21st day of January, A. D. 1932.

And the Clerk of said Court will please forthwith record this Notice and Entry of Appeal as required by law.

Kay, Adams, Ragland & Kurz, Solicitors for Appellants Above Named.

I, Paul V. Lang, Clerk of the Circuit Court, in and for Leon County, Florida, do hereby certify that the Notice and Entry of Appeal filed on the 19th day of December, A. D. 1931, in said cause of Louis K. Liggett, Winn & Lovett Grocery Company, and Paxson's Inc. a Corporation, complainants, and The Nunnally Company, a Cor-

poration, Mellville Shoe Corporation, a corporation, G. R. Kinney Shoe Company, a corporation, J. C. Penney Company, a Corporation, F. W. Woolworth Company, a Corporation, Montgomery Ward & Company, a corporation, The Great Atlantic & Pacific Tea Company, a corporation, United Cigar Stores Company, a corporation, Southern Stores Corporation, a corporation, and South Florida Stores Corporation, a corporation, Intervenors, against [fol. 147] Ernest Amos, as Comptroller of the State of Florida, R. B. Council as Tax Collector of Leon County, Florida, and R. F. Bowden, as Tax Collector of Duval County, Florida (#2899) was forthwith on the same day duly entered and recorded in Chancery Order Book No. 9, at page 600 of the records of said Circuit Court.

And I further certify that the above and foregoing is a true and correct copy and literal transcript of the record of said Notice and Entry of Appeal as the same appears of record in said Chancery Order Book No. 9, at page 600, of the records of said Circuit Court.

In witness whereof I have hereunto set my hand and affixed the seal of said Circuit Court, this December 19th, A. D. 1931.

Paul V. Lang, Clerk Circuit Court in and for Leon County, Florida. (Court Seal.)

[fol. 148] In Circuit Court of Leon County

[Title omitted]

[fol. 149] Assignments of Error—Filed Dec. 19, 1931

Come now Louis K. Liggett Company, a Corporation, Winn & Lovett Grocery Company, a Corporation, and Paxson's, Inc., a Corporation, Complainants, and the several Intervenors above named, pursuant to their several appeal in said cause, and severally assign the following errors to be considered by the Supreme Court of Florida in said cause:

1. Said Circuit Court erred by its decree of December 15, 1931, recorded in Chancery Order Book 9, at page 598, in that said decree denied the application of said Complain-

ants for a temporary restraining order as prayed for in the amended bill of complaint filed in said cause.

2. Said Circuit Court erred by its decree of December 15, 1931, recorded in Chancery Order Book 9, at page 598, in that said decree granted the motion of said defendants to dismiss the amended bill of complaint filed in said cause, and dismissed said amended bill of complaint.

3. Said Circuit Court erred by its final decree of December 15, 1931, Recorded in Chancery Order Book 9, at page 598, in that the effect thereof was to dismiss the petition of intervention filed by each of said intervenors severally.

[fols. 150-154] 4. Said Circuit Court erred by its decree of December 15, 1931, recorded in Chancery Order Book 9, at page 598, in that the effect of said decree is to hold that Chapter 15624 Laws of Florida, 1931, is valid, and does not violate sections 1, 4 and 12 of the Florida Declaration of Rights in the particulars severally complained of in the amended bill of complaint filed in said cause, and in the several petitions of intervention filed in said cause.

5. Said Circuit Court erred by its decree of December 15, 1931, recorded in Chancery Order Book 9, at page 598, in that the effect thereof is to hold that Chapter 15624 Laws of Florida, 1931, is valid, and does not violate the due process clause and the equal protection of the laws clause of the 14th Amendment to the Federal Constitution, in the particulars severally complained of in said amended bill of complaint, and in the several petitions of intervention filed by the intervenors aforesaid.

Kay, Adams, Ragland & Kurz, Attorneys for Complainants and Intervenors.

Copy of the foregoing assignments of error received this 19 day of December, A. D., 1931.

H. E. Carter, Asst. Atty. Gen., of Counsel for Defendants.

On the 19th day of December, A. D. 1931, Complainants filed stipulation of counsel for preparation of transcript of record, same being in the words and figures following:

Stipulation omitted in printing.

[fol. 155] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 156 & 157] Minute entry of argument and submission, January 7, 1932, omitted in printing.

[fol. 158] IN SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1932, EN BANC

LOUIS K. LIGGETT COMPANY, a Corporation, et al., Appellants,

vs.

ERNEST AMOS, as Comptroller of the State of Florida, et al., Appellees

Leon County

An Appeal from the Circuit Court for Leon County, E. C. Love, Judge

Kay, Adams, Ragland & Kurz, for Appellants.

Cary D. Landis, Attorney General, and H. E. Carter, Assistant, for Appellees.

OPINION—Filed April 4, 1932

TERRELL, J.:

The Legislature of 1931 in Extraordinary Session enacted Chapter 15624, Laws of Florida, imposing licenses and fees for opening, operating, maintaining, or establishing stores in this State and to define the duties of the Comptroller and Tax Collectors of the several counties with reference thereto.

This suit was brought by appellants pursuant to Section Fourteen of the 1931 Chancery Act (Chapter 14658 Acts of 1931) to test the validity of Chapter 15624 generally referred to as the Chain Store Act. The chancellor below held the act valid as against the attack made on it and granted the defendant's motion to dismiss the bill of com-

plaint at the cost of the complainants. Appeal was taken from that decree.

[fol. 159] It is first contended that Chapter 15624 was enacted in violation of Section Eight of Article Four of the Constitution of Florida in that certain amendments thereto adopted in the Senate June 24, 1931, and in the House of Representatives June 19, 1931, constituted "legislative business" and were not adopted by a two-thirds vote, neither was the subject matter of said Act embraced within the Governor's proclamation of June 6, 1931 calling the Legislature in Extraordinary Session.

Section Eight of Article Four of the Constitution provides for calling the Legislature in Extraordinary Session and limits legislative business transacted at such sessions to that stated in the proclamation of the Governor calling the session or that called to the attention of the Legislature while in session or that initiated while in session by a vote of two-thirds of each house. We think the subject matter of Chapter 15624 was fully comprehended in the proclamation of the Governor calling the Legislature in Extraordinary Session but if it was not so comprehended the record discloses that both the House of Representatives and the Senate agreed by a two-thirds vote to receive and consider committee substitute for House Bill 8-X which was finally adopted and became Chapter 15624. The two-thirds vote required by Section Eight of Article Four applies only to the matter of taking up "legislative business" for consideration not embraced in the Governor's proclamation or called by him to their attention while in session. After agreeing by two-thirds vote to consider any "legislative business" it then takes the regular course under the rules and may be amended, adopted, or rejected by a majority vote. For all the record shows Chapter 15624 was adopted by a two-thirds vote.

It is next contended that Section Five of Chapter 15624 creates arbitrary and unreasonable discriminations between chain or multiple store retail merchants and single [fol. 160] store retail merchants engaged in the same class of business contrary to the equal protection and the due process clauses of the Federal Constitution and Sections One, Four, and Twelve of the Declaration of Rights, Constitution of Florida. This is the dominant question presented and the answer to it is decisive of the case.

Section Five Chapter 15624 is as follows:

"Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act.

" 'The license fees herein prescribed shall be as follows:

" '(1) Upon one store, the annual license fee shall be Five Dollars for each such store.

" '(2) Upon two stores or more, but not exceeding fifteen stores, where the same are located in any one county, the annual license fee shall be Ten Dollars for each such additional store.

" '(3) Upon two stores or more, but not to exceed fifteen stores, where the same are located in different counties, the annual license fee shall be Fifteen Dollars for each such additional store.

" '(4) Upon each store in excess of fifteen, but not to exceed thirty, when all are located in any one county, the [fol. 161] annual license fee shall be Fifteen Dollars for each such additional store.

" '(5) Upon each store in excess of fifteen, but not to exceed thirty, where the same are located in different counties, the annual license fee shall be Twenty Dollars for each such additional store.

" '(6) Upon each store in excess of thirty, but not to exceed fifty, where all are located in any one county, the annual license fee shall be Twenty Dollars for each such additional store.

" '(7) Upon each store in excess of thirty, but not to exceed fifty, where the same are located in different counties, the annual license fee shall be Thirty Dollars for each such additional store.

"'(8) Upon each store in excess of fifty, but not to exceed seventy-five stores, where all are located in any one county, the annual license fee shall be Thirty Dollars for each such additional store.

"'(9) Upon each store in excess of fifty, but not to exceed seventy-five, where the same are located in different counties, the annual license fee shall by Forty Dollars for each such additional store.

"'(10) Upon each store in excess of seventy-five, where all are located in any one county, the annual license fee shall be Forty Dollars for each such additional store.

"'(11) Upon each store in excess of seventy-five, where [fol. 162] the same are located in different counties, the annual license fee shall be Fifty Dollars for each such additional store.

"'In addition to the above amounts, Three Dollars for each and every One Thousand Dollars of value of stock carried in each store for sale in such store.'"

As a prelude to the exegesis which follows we may say that remarkably few cases have made their appearance in this Court so thoroughly prepared and presented. Counsel for Appellants have supported their cause by many publications from the pens of some of the outstanding specialists in this country. These publications are devoted exclusively to the origin, history, economic, and social development of the chain store business and while they do not treat the legal aspect of the case with which we are here confronted they throw much light on it. We had conceived the chain store as a product of our industrial era but by a well established chronology its roots sink much deeper in our history, so deep in fact that it is coeval with the discovery of America, and it may be entirely possible that Columbus provisioned the Pinta, the Nina, and the Santa Maria from a chain store when he set out on his famous voyage in 1492.

This Court has repeatedly held that to construe or test the validity of a legislative enactment, resort may be made to the history of the legislation, the contemporary conditions, political, industrial, and social of the community at whose suggestion the statute was promulgated and that it

may be compared with cognate laws to determine its meaning and effect. Lee vs. Clearwater Growers Association 93 Fla. 214, 11 So. 722; Amos vs. Matthews 99 Fla. 1, 126 So. 308; Jerome H. Sheip Co. vs. Amos 100 Fla. 863, 130 [fol. 163] So. 699; Gray vs. Central Florida Lumber Co. decided by this Court March 15, 1932.

The term "due process of law," or "law of the land", as written in Magna Carta, was engrafted on the Federal and State Constitutions from the Petition of Right where it appears to have been first used, though it has the same meaning regardless of the form in which used. As applied to life, liberty, or property, due process of law is a fundamental, personal, Constitutional guaranty and as against the United States it is provided by the Fifth and Fourteenth Amendments. As against the States, it is provided by the Fourteenth Amendment and as against the State of Florida, it is provided by Sections Four and Twelve of the Declaration of Rights. The language of the Fifth and Fourteenth Amendments as to due process is identical yet they were engrafted on the Constitution under very different circumstances. We do not discuss these circumstances here except to say that while the Fifth Amendment as a restraint on the Federal government preceded the Fourteenth by most one hundred years, it was rarely invoked while as soon as the restrain- against the states was provided in the Fourteenth Amendment, the dockets of the courts were crowded with cases affecting it. Courts have generally proceeded on the assumption that the legal import of the phrase was the same in both Amendments yet it is admitted that circumstances might arise in which a different construction and application of their provisions would be proper. French vs. Barber Asphalt Paving Co. 181 U. S. 324, 328, 21 Sup. Ct. Rep. 625, 45 L. Ed. 879. See also Slaughter House Cases 16 Wall (U. S.) 36, 21 L. Ed. 394.

The Supreme Court of the United States has consistently declined to attempt a precise definition of "due process of law", Davidson vs. New Orleans, 96 U. S. 97, 101, 24 L. Ed. 616, but has frequently commended this Constitutional guaranty, Holden vs. Hardy, 169 U. S. 366, 389, 18 Sup. Ct. [fol. 164] Rep. 383, 42 L. E. 780, Yick Wo vs. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. Ed. 220; Bank of

Columbia vs. Okely, 4 Wheat. (U. S.) 235, 244, 4 L. Ed. 559. Its meaning is discussed generally in Kennard vs. Louisiana, 92 U. S. 480, 23 L. Ed. 478; Davidson vs. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Ex Parte Wall 107 U. S. 265, 2 Sup. Ct. Rep. 569, 27 L. Ed. 552; Hagar vs. Reclamation Dist. No. 108, 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. Ed. 569; Missouri Pac. Ry. Co. vs. Humes, 115 U. S. 512, 6 Sup. Ct. Rep. 110, 29 L. Ed. 463; Freeland vs. Williams, 131 U. S. 405, 9 Sup. Ct. Rep. 763, 33 L. Ed. 193; Hallinger vs. Davis, 146 U. S. 314, 13 Sup. Ct. Rep. 105, 36 L. Ed. 986.

As applied to crimes, life or liberty being involved; "due process of law" requires that all persons so charged be tried in a court of justice acording to the rules and regulations provided by law for its orderly administration. When orderly administration is supplanted by arbitrary, unreasonable or unwarranted exercise of governmental power "due process of law" is denied. As applied to property, "due process of law" presents a more complex question. For this reason on pain of failure to be sufficiently comprehensive and prespicuous, state and federal courts have generally determined the application of the principle by judicial inclusion and exclusion as the case arises and have made no attempt at a comprehensive definition to fit every case. Due process of law is in its final analysis a judicial question and whenever invoked requires opportunity for hearing and defense in proceedings appropriate to the case and just to the parties affected. It must be pursued in an orderly manner in proceedings adopted to the end to be attained. It implies conformity with the natural and in- [fol. 165] herent principles of justice for the protection of individual rights, forbids the taking of one's property without compensation and requires that no one be condemned in person or property without opportunity to be heard. Holden vs. Hardy 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. Ed. 780. As applied in the Dartmouth College Case (4 Wheat. (U. S.) 518, 4 L. Ed. 629) Mr. Webster defined it as the law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning of all this is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society in our democracy.

The "equal protection of the laws", like "due process of law", as applied to life, liberty, and property is likewise a fundamental, personal, Constitutional guaranty, and as against the States and the United States is provided by the Fourteenth Amendment. As against the State of Florida, it is secured by Sections One and Four of the Declaration of Rights. Both rights are ultimately of judicial determination and are frequently treated together

The equal protection clause, like the due process clause, is generally not susceptible of exact delimitation. It is also said by some courts that no definite rule in respect of either, which will automatically solve the question in specific instances, can be formulated. Certain general principles, however, have been established, in the light of which the cases as they arise are to be considered and determined. It has been said generally that "equal protection of the law" means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes of persons in the same place and in like circumstances. Connolly vs. Union Sewer Pipe [fol. 166] Co. 184 U. S. 540, 558, 22 Sup. Ct. Rep. 431, 46 L. Ed. 679; Bowman vs. Lewis 101 U. S. 22, 25 L. Ed. 989; Kentucky Railroad Tax Cases 115 U. S. 321, 6 Sup. Ct. Rep. 57, 29 L. Ed. 414; Magoun vs. Illinois Trust and Savings Bank 170 U. S. 283, 293, 18 Sup. Ct. Rep. 594, 42 L. Ed. 1037.

Prior to the adoption of the Fourteenth Amendment, the law of the states in terms insured equal protection to all persons. The Fourteenth Amendment conferred no new or additional right but merely extended the protection of the Federal Constitution over the right to life, liberty, and property that previously existed under all State Constitutions. The right so extended is secured to all persons whether citizens or not and that which constitutes denial of equal protection will depend largely on what protection has been extended or what rights have been conferred under the Constitution and laws of the particular state in which the question arises. The rule that each case must rest on its own facts is particularly applicable to this class of cases. Nashville C. & St. L. Ry. vs. Taylor 86 Fed. 168, text 185.

The prohibition against the denial of equal protection "was not intended to compel the state to adopt an iron rule

of equal taxation" nor "to prevent a state from adjusting its system of taxation in all proper and reasonable ways". Bell's Gap R. Co. vs. Pennsylvania 134 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. Ed. 892. Neither does it prevent the states from distinguishing, selecting, and classifying objects of legislation within a wide range of discretion, provided only that the discretion must be based on some reasonable ground. If the statute or classification is applicable to all persons under like circumstances and subjects no one [fol. 167] to arbitrary exercise of power or if it operates alike on all persons similarly situated, it is sufficient. Tinsley vs. Anderson 171 U. S. 101, 18 Sup. Ct. Rep. 805, 43 L. Ed. 91; Walston vs. Nevin 128 U. S. 578, 9 Sup. Ct. Rep. 192, 32 L. Ed. 544. The classification may be limited as to objects or territory if all persons subject to it are treated alike under like circumstances and conditions. Hayes vs. Missouri 120 U. S. 68, 7 Sup. Ct. Rep. 350, 30 L. Ed. 578; Giles v. Teasley 193 U. S. 146, 24 Sup. Ct. Rep. 359, 48 L. Ed. 655; Toyota vs. Territory of Hawaii 226 U. S. 184, 33 Sup. Ct. Rep. 47, 57 L. Ed. 180.

"Classification must have relation to the purpose of the legislature, but logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion even though it result in ill advised, unequal, and oppres-ive legislation"; Heath & Milligan M*g*f. Co. vs. Worst 207 U. S. 338, 28 Sup. Ct. Rep. 114, 52 L. Ed. 236; Mobile County vs. Kimball 102 U. S. 691, 26 L. Ed. 238.

The Supreme Court of Pennsylvania has held that whether a classification under a statute is a denial of equal protection of the laws is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrational ones used for the purpose of evading the Constitutional prohibition. If the distinctions are genuine, the courts cannot declare them void, though they may not consider them made on a sound basis. The test is not wisdom but good faith in the classification. Seabolt vs. Commissioners of Northumberland *Company* 187 Pa. St. 318, 41 Atl. 22; Commonwealth vs. Randall 225 Pa. 197, 73 Atl. 1109.

[fol. 168] In the imposition of an excise tax, the rule of equality and uniformity as guaranteed by Article Nine of the Constitution is not involved. Excise taxes have been imposed in many ways but so long as they are reasonable, not unjustly discriminatory, nor arbitrary, whimsical, irrational, grossly oppressive, plainly unequal or contrary to common right, they will be upheld. State ex rel. Bonsteel vs. Allen 83 Fla. 214, 91 So. 104; Jackson vs. Neff 64 Fla. 326, 60 So. 350; Peninsula Casualty Co. vs. State 68 Fla. 411, 67 So. 165; Amos vs. Gunn 84 Fla. 285, 94 So. 615; Amos vs. Matthews 99 Fla. 1, 126 So. 308; Jerome H. Sheip Co. vs. Amos 100 Fla. 863, 130 So. 699.

Perfect equality in the operation of laws imposing a tax on real estate is recognized as impossible. It is even more difficult to arrive at uniformity in the operation of an excise tax, but mere inequality or lack of uniformity in its operation is no bar to its enforcement. It must be so arbitrary and oppres-ive as to clearly amount to a denial of due process or of equal protection and where, as here, the public health and safety are not involved, the ultimate test is whether or not the excise so imposed is so arbitrary and oppressive as to prohibit a great number, if not all persons from pursuing occupations otherwise lawful. Jerome H. Sheip Co. vs. Amos, supra; American Uniform Co. vs. Commonwealth 237 Mass. 42, 129 N. E. 622.

It is generally recognized that in the application of an excise tax, some objects of taxation will bear the burden while others will be relieved of it, one business will be selected while another will be omitted and one class of property will be taxed while another will go tax free. This fact, however, or the fact that it bears more heavily on one person or corporation than on an-ther, does not vitiate the ex-[fol. 169] cise. Clay Products Co. vs. United States 52 Fed. (2nd) 1033.

The rule is thus recognized in this State that the judiciary cannot nor will it attempt to prescribe to the Legislature limitations on its power and while there is no express limitation on the power of the Legislature to provide an excise or tax on licenses, nevertheless, the organic requirements of due process and equal protection must be observed in imposing such a tax. Roach vs. Ephren 82 Fla. 523, 90 So.

609; State ex rel. Bonsteel vs. Allen 83 Fla. 214, 91 So. 104, 26 A. L. R. 735; Hyers vs. Mitchell 95 Fla. 345, 116 So. 81; Jackson vs. Neff 64 Fla. 326, 60 So. 350; Jerome H. Sheip Co. vs. Amos 100 Fla. 865, 130 So. 699; Gray vs. Central Fla. Lumber Company, supra.

An examination of the Federal and Florida cases on this point discloses that the Federal rule governing the imposition of excises is more liberal than the rule in this state. Here, we require the observance of due process and equal protection in the imposition of such taxes while the Federal Courts hold that the reasonableness of an excise imposed for revenue purposes is a legislative prerogative that will not be inquired into by the courts either as to the amount of the tax or the property on which it is imposed. It makes no difference if the tax in practical effect operates to suppress the business taxed, that fact alone will not render an act of Congress unconstitutional. Hiers vs. Mitchell, supra; Jerome H. Sheip Co. vs. Amos, supra, both citing Federal cases supporting this rule. Others are cited in this opinion.

The second net result extracted from these opinions is that as to equal protection, the decisions of the Florida and Federal Courts are in harmony. In other words, there is no such thing as degree when we come to the admeasure-[fol. 170] ment of equal protection while as to due process, the Federal rule is much more liberal than the state rule, due largely to the weight attached to the determination of that question by the legislative body.

But Appellants contend that in consideration of the factual situation in this case, due process and equal protection are denied them in that Subsections One, Two, Four, Six, Eight, and Ten of Section Five of Chapter 15624 as above quoted, create arbitrary and unreasonable discriminations between single store retail merchants and chain or multiple store retail merchants.

The answer to this contention turns on whether or not the classification of retail stores for purposes of taxation under Subsections One, Two, Four, Six, Eight, and Ten of Section Five, Chapter 15624, is reasonable, not arbitrary or capricious and rests upon some reasonable distinction in the subjects classified. In the nature of things, there cannot be an exact inclusion and exclusion of the persons or things classified. Ozan Lumber Co. vs. Union County Nat.

Bank of Liberty 207 U. S. 251, 28 Sup. Ct. Rep. 89, 52 L. Ed. 195.

The Subsections of Section Five as enumerated first lay an annual license tax on retail stores, increasing progressively with the number of stores under the same general management and located in a single county. The act in other words classifies or points out the chain store and imposes a different measure of taxation on it for the privileges of doing business from that imposed on stores owned and operated as individual units. Appellants say that there is [fol. 171] no substantial difference between the business done and the manner of operating the chain store and the individual unit that would justify the classification on the basis of which the additional tax is imposed.

The record discloses material points of difference between chain stores and independently owned units. Such differences consist in the method of management, group control of store operation, frequent turnover, cooperative advertising, cooperative buying, suitable location, display of goods, training of employees, the combination of wholesale and retail functions under one control, and serving the public in the manner the public desires to be served. These differences were ample basis for the classification complained of.

Appellants assert that like advantages are available to independent stores and when properly applied will produce the same or similar results. This assertion may be true in part but in the nature of things it cannot be true as a whole. It is common knowledge that the chain store possesses many distinguishing features that give it an advantage over the independent store dealing in the same commodities. Its method of integration for purposes of cooperative buying, community advertising, traffic in "selling talk", displaying, serving the public, unqualified control of wholesaling and retailing, and commanding capital could, under no circumstances become available to the independent store with such results as flow therefrom to the chain store.

This phase of the question is conclusively settled against the contention of Appellants by the Supreme Court of the [fol. 172] United States in State Board of Tax Commissioners vs. Jackson 283 U. S. 527, 51 Sup. Ct. Rep. 540,

75 L. Ed. 1248. Speaking through Mr. Justice Roberts, that Court said:

"The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations, Bell's Gap. R. Co. vs. Pennsylvania 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. 533; Southwestern Oil Co. vs. Texas, 217 U. S. 114, 54 L. Ed. 688, 30 S. Ct. 496; Bron-Forman Co. vs. Kentucky, 217 U. S. 563, 54 L. Ed. 883, 30 S. Ct. 578. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Ref. Co. vs. Louisiana 179 U. S. 89, 45 L. Ed. 102, 21 S. Ct. 43, or if any state of facts reasonably can be conceived to sustain it. Rast vs. Dan Deman & L. Co. 240 U. S. 342, 60 L. Ed. 679, L. R. A. 1917A, 421, 36 S. Ct. 370, Ann. Cas. 1917B, 455; Quong Wing vs. Kirkendall 223 U. S. 59, 56 L. Ed. 350, 32 S. Ct. 192. As was said in Brown-Forman Co. vs. Kentucky, supra. * * *"

State Board of Tax Commissioners vs. Jackson, just [fol. 173] quoted from, is known as the Indiana Chain Store Case. The Indiana Act upheld in that case was different in some respects from the Florida Act involved in this case but these differences were not material to a disposition of the point under review. The Indiana Act applies to wholesale and retail stores, the Florida Act applies only to retail stores, the Indiana Act imposes a license fee of from three to twenty-five dollars, the Florida Act imposes a license fee of from five to fifty dollars when the stores are located in a single county and fifteen to fifty dollars when located in different counties, the Indiana Act graduates the license tax on the basis of the number of stores located in the state under a single management while the Florida Act graduates the license tax, first, on the basis of the number of stores located in a single county under a single management, and second, on the basis of the

number of stores located in different counties under a single management.

As a second phase to this question, Appellants contend that in consideration of the factual situation in this case, the provisions of Subsections Three, Five, Seven, Nine, and Eleven of Section Five of the Florida Act imposing a greater burden on retail merchants doing business in different counties under the same management than that imposed on retail merchants doing business in a single county under the same management is an arbitrary and an unreasonable discrimination.

It may be admitted that this question was not directly before the Court in the Indiana Case, however, what we have said in this opinion on the subject of classification is [fol. 174] applicable to the latter contention. It may be said further that nothing less than an arbitrary exercise of power can be stricken down under the Fourteenth Amendment. Judicial interference cannot be predicated solely on unjust and oppressive legislation, neither can invalidity stand on the mere fact that the act appears faulty. Metropolis Theatre Co. vs. City of Chicago 228 U. S. 61, 33 Sup. Ct. Rep. 441, 57 L. Ed. 730.

In Toyota vs. Territory of Hawaii 226 U. S. 184, 33 Sup. Ct. Rep. 47, 57 L. Ed. 180, the Supreme Court upheld a statute of Hawaii imposing a license tax of six hundred dollars on auctioneers in the district of Honolulu and a like tax of fifteen dollars on auctioneers in each other taxing district in the island. The act was assaulted on the ground that it deprived an auctioneer in Honolulu of -is property without due process of law and denied him the -qual protection of the law. The opinion in this case was written by the present Chief Justice before his retirement from that Court.

In Pacific American Fisheries vs. Territory of Alaska 269 U. S. 269, 46 Sup. Ct. Rep. 110, 70 L. Ed. 270, an act of the Territory of Alaska was upheld which imposed a surtax on an upward graduated scale per case of certain types of canned fish. It was there contended that the act discriminated against large canneries in favor of small ones but the act was upheld on the theory that classification for taxes on the basis of the amount of the corpus taxed had frequently been approved.

In Hayes vs. Missouri 120 U. S. 68, 7 Sup. Ct. Rep. 350, [fol. 175] 30 L. Ed. 578, a statute of the State of Missouri was upheld which provided that in the trial of Capital cases, in cities having a population of over 100,000 inhabitants, the state should be allowed fifteen peremptory challenges to jurors, while elsewhere in the state it was allowed only eight peremptory challenges in such cases. It was contended that the act denied to one accused of murder in a city of more than 100,000 the equal protection of the law.

In Metropolis Theatre Co. vs. City of Chicago 228 U. S. 61, 33 Sup. Ct. Rep. 441, 57 L. Ed. 730, an ordinance of the City of Chicago was upheld which imposed a license tax on places of amusement, graduated according to the price of admission for single seats. If the price of admission was one dollar, the license tax was one thousand dollars. If the price of admission exceeded fifty cents but was less than one dollar the license tax was four hundred dollars. The classification was sustained in the face of a showing that some theatres charging the higher admission received less revenue than those charging the lower admission.

The foregoing including the following cases on the question of classification might be enlarged ad infinitum. In addition to supporting the law of this case they demonstrate the utter impossibility of casting a taxing statute under our social structure that does not contain some inequalities and work hardships in individual cases. And while it has been repeatedly pronounced that there is no [fol. 176] limit to the discretion of the Legislature in classifying trades, occupations, and businesses for purposes of taxation so long as the classification rests on reason and is not arbitra-y or capricious, caution should be exercised in all instances to reduce hardships and inequalities to the irreducible minimum. Clark vs. City of Titusville 184 U. S. 329, 22 Sup. Ct. Rep. 382, 46 L. Ed. 569; Central Lumber Co. vs. State of South Dakota 226 U. S. 157, 33 Sup. Ct. Rep. 661, 57 L. Ed. 164; Quong Wing vs. Kirkendall 223 U. S. 59, 32 Sup. Ct. Rep. 192 56 L. Ed. 350; Southwestern Oil Co. vs. State of Texas 217 U. S. 114, 30 Sup. Ct. Rep. 496, 54 L. Ed. 688, Armour & Co. v. Commonwealth of Virginia 246 U. S. 1, 38 Sup. Ct. Rep. 267, 62 L. Ed. 547; Alaska Fish Salting & By-Products Co. vs. Smith 255 U. S. 44, 41 Sup. Ct. Rep. 219, 65 L. Ed. 489; Ohio Oil Co. vs.

Conway 281 U. S. 146, 50 Sup. Ct. Rep. 310, 74 L. Ed. 775; Great Atlantic and Pacific Tea Co. et al. vs. Maxwell, decided October 26, 1931, cited in Sup. Ct. Rep. November 15, 1931; Reyman Brewing Co. vs. Vrister, 179 U. S. 445, 21 Sup. Ct. Rep. 201, 45 L. Ed. 269; Peninsular Industrial Ins. Co. vs. State 61 Fla. 376, 55 So. 398; Lindsley vs. Natural Carbonic Gas Co. 220 U. S. 61, 31 Sup. Ct. Rep. 337, 55 L. Ed. 369.

We think that in either event the classification complained of may be held to withstand the challenge directed against it. We see nothing in the factual situation to differentiate this aspect of the case from State Board of Tax Commissioners vs. Jackson, supra, neither do we see any thing in the classification either as to stores under the same management in a single county or under the same management in different counties that would do violence to the rule [fol. 177] of due process or equal protection as announced in the decisions of this Court. Owners of chain stores are classified on two bases and all in each class are treated alike. If located in different counties the necessary implication of larger volume wider circulation, growing profits, business expansion and larger opportunity under group control must follow. These facts are ample to support that classification.

As a third phase to the main question Appellants contend that the ultimate purpose and effect of Chapter 15624 is to throttle competition, repress the diligent in business, and to impose a burden on superior skill, initiative, and industry, contrary to the American idea of inalienable rights as expressed in the Declaration of Independence and the Declaration of Rights.

Primarily this contention presents a question of economics or policy rather than one of law. The policy and expediency of an excise tax is always a question for legislative determination. The objects on which it is imposed, the amount of the tax, and the standard employed to measure the tax are matters in which legislative discretion may take a wide range. The judiciary is not authorized to revise the judgment of the Legislature on these matters even though it impose a burden on superior skill initiative, and industry unless that burden is shown to be unequal, grossly oppressive, or offends against every impulse of common right and justice.

We know of no reason nor do Appellants cite any for relieving superior skill, initiative, and industry from the payment of a tax. The sole justification for any form of taxation is to support the institutions of government. Our [fol. 178] taxing laws, organic and statutory, were cast to meet the needs of an agricultural country when practically all of our values were in land. If they cannot be construed and recast to meet the needs of this industrial era when the major portion of our values are represented by personal property then the burden of government is inequitably distributed and equal protection as contemplated by the constitution is defeated.

It is next contended that the proviso of Section Eight of Chapter 15624 exempting filling stations engaged exclusively in the sale of gasoline and other petroleum products creates an arbitrary and unreasonable discrimination against all owners of retail stores contrary to due process and equal protection.

The proviso to Section Eight applies only to filling stations engaged exclusively in the sale of gasoline and other products of petroleum. Exclusive of other considerations there is ample ground for the exemption of filling stations from the provisions of the act. They are inherently different from ordinary retail stores and a heavy excise tax is collected from gasoline and other petroleum products sold by them (Chapter 15659 Acts of 1931, Laws of Florida). If a retail store as contemplated by Chapter 15624 was operated in connection with the filling station, it would be subject to the tax imposed. Such a classification or distinction is far from being palpably arbitrary and the rule is that it must be upheld if there be any conceivable state of facts on which it can rest. Southern Grocery Stores [fol. 179] Inc. vs. South Carolina Tax Commission United States District Court, Eastern District of South Carolina, decided February 2, 1932, opinion by Judge John J. Parker is conclusive of this point. See also Rast vs. Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. Rep. 370, 60 L. Ed. 679, L. R. A. 1917A 421; Ann. Cas. 1917B, 455; Wampler v. Cecompte, 282 U. S. 172, 51 Sup. Ct. Rep. 92, 75 L. Ed. 276; South Carolina Power Co. vs. South Carolina Tax Commission, 52 Fed. (2nd) 515.

Other alleged invalidities interposed by Appellants relat-s to the exemption of wholesale merchants, the penalty

of twenty-five per cent of the license tax imposed when renewals for licenses are not made on or before the tenth day of November of each year, the administration of the act and burden on interstate commerce.

We have examined each of these questions and find them to be without merit. The license year under the Act runs from October first to October first of each year. No license lapses prior to October 31, all licensees who have not renewed a/e then notified by registered mail and are required to renew on or before November 10, or suffer the twenty-five per cent added to the amount of their license fee as penalty for not complying promptly. Identical or similar provisions are carried in most State and Federal revenue acts and have been often upheld.

The decree of the Chancellor is accordingly affirmed.

Affirmed.

Buford, C. J., and Whitfield and Davis, JJ., concur.

Ellis and Brown, JJ., dissent.

[fol. 180] IN SUPREME COURT OF FLORIDA

CONCURRING OPINION

Davis, J. (concurring):

I concur in the opinion and judgment, but deem it of importance to point out that one proposition was argued by appellants which is not discussed in the very able opinion prepared by Mr. Justice Terrell to express the views of a majority of the Court covering the constitutional propositions decided.

Appellants argue that the Comptroller's administration of the Act is arbitrary and unreasonable, in that the Comptroller, under the advice of the Attorney General, has announced that the provisions of the Act will not be enforced against certain persons firms and corporations which appellants say are as much subject to the Act as they are, but are being exempted from the burdens thereof, by unlawful and unjustified administrative rulings.

Assuming, but not deciding, that all these complaints are true, and that the Act is in fact being so unjustifiably enforced as to deny to appellants the equal protection of the

laws by reason of its administration, appellants have a plain, complete and adequate remedy at law to coerce the non discriminatory administration of the Act by mandamus against the tax officers to compel them to apply the provisions of the statute to all who are legally subject thereto. See State ex rel Dofnos Corporation vs. Lehman, 100 Fla. 1401, 131 Sou. Rep. 33, 3rd headnote.

To enjoin the enforcement of the Act against appellants, because others than appellants are unjustly and unlawfully escaping from the tax the Act imposes, would be to increase, [fol. 180½] not diminish, the denial of the equal protection of the laws complained of, by adding to the class of those already unlawfully exempted by administrative rulings, an additional class consisting of appellants.

Two wrongs do not make a right. Neither does the fact that tax officers commit a wrong in favor of one, entitle another to the privilege of that same wrong in his favor.

All citizens and taxpayers are entitled to a fair, impartial, just and equal administration of the revenue laws, which right, as this Court has pointed out, may be enforced by mandamus against officials who would try to do otherwise. The remedy for unequal administration is therefore not by injunction to cripple enforcement, but by mandamus to strengthen it.

Whitfield and Terrell, JJ., concur.

[fol. 180a] In Supreme Court of Florida, January Term, A. D. 1932, en Banc

[Title omitted]

Statement of Facts

This appeal is taken from an interlocutory order granting the motion of appellees to dismiss the amended bill brought by the appellants to enjoin the enforcement of Chapter 15624 of the Laws of Florida adopted in 1931, on the ground of the alleged unconstitutionality of said act.

Section 5 of the act reads:

"Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or main-

taining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act.

[fol. 180b] The license fees herein prescribed shall be as follows:

(1) Upon one store, the annual license fee shall be Five Dollars for each such store.

(2) Upon two stores or more, but not exceeding fifteen stores, where the same are located in any one county, the annual license fee shall be Ten Dollars for each such additional store.

(3) Upon two stores or more, but not to exceed fifteen stores, where the same are located in different counties, the annual license fee shall be Fifteen Dollars for each such additional store.

(4) Upon each store in excess of fifteen, but not to exceed thirty, when all are located in any one county, the annual license fee shall be Fifteen Dollars for each such additional store.

(5) Upon each store in excess of fifteen, but not to exceed thirty, where the same are located in different counties, the annual license fee shall be Twenty Dollars for each such additional store;

(6) Upon each store in excess of thirty, but not to exceed fifty, where all are located in any one county, the annual license fee shall be Twenty Dollars for each such additional store.

(7) Upon each store in excess of thirty, but not to exceed fifty, where the same are located in different counties, the annual license fee shall be Thirty Dollars for each such additional store.

(8) Upon each store in excess of fifty, but not to exceed seventy-five stores, where all are located in any one county, the annual license fee shall be Thirty Dollars for each such additional store.

(9) Upon each store in excess of fifty, but not to exceed seventy-five, where the same are located in different counties, the annual license fee shall be Forty Dollars for each such additional store.

(10) Upon each store in excess of seventy-five where all are located in any one county, the annual license fee shall be Forty Dollars for each such additional store.

[fol. 180c] (11) Upon each store in excess of seventy-five, where the same are located in different counties, the annual license fee shall be Fifty Dollars for each such additional store.

In addition to the above amounts, Three Dollars for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store."

Section 11 of the act provides that:

Section 11. A county license tax of twenty-five per cent of the state license tax shall be levied and imposed upon each store as herein defined and each incorporated municipality of the State of Florida is authorized to levy a municipal license tax of twenty-five per cent of the state tax imposed by this Act, provided that the tax levied by or for the several counties and municipalities shall be graduated only on the number of stores situate in such county or municipality, respectively, notwithstanding the applicant may own other stores beyond the limits of such county or municipality, as the case may be. In all cases coming within this Section of this Act, where the license must be obtained from the Comptroller of the State of Florida, the county and municipal taxes shall be paid by the applicant to the Comptroller and immediately remitted to the proper officers of the several counties and municipalities of the State.

The plaintiffs, Louis K. Liggett Company, owning and operating 22 retail drug stores in various counties in Florida, Winn & Lovett Grocery Company, owning and operating 58 retail grocery stores in various counties in this State, and Paxson's Inc., owning and operating seven shoe stores in Florida and one in Georgia, all being corporations, [fol. 180d] bring this as a class suit, for the benefit of plaintiffs and all other merchants similarly situated who may desire to avail themselves of the benefits thereof. (See

section 14, Chancery Procedure Act of 1931.) The following parties filed petitions asking that they be allowed to intervene, on account of their interest in the subject matter, and, while setting up facts peculiar to their own situation, adopted the allegations of the bill attacking the constitutionality of the act: Independent Furniture Company; The Nunnally Company, G. R. Kinney Shoe Co., Southern Stores Corporation, South Florida Stores Corporation, Melville Shoe Corporation; J. C. Penney Company, F. W. Woolworth Company, Montgomery Ward & Company, the Great Atlantic & Pacific Tea Company and the United Cigar Stores Company, all owning and operating retail stores, situated at different points in Florida. Montgomery Ward Company allege that they operate only one store in Florida, but the other petitioners allege that they own and operate varying numbers of stores in this state, running from three to 226 stores each, most of them operating stores in more than one county. Several of these petitioners were by order of the court permitted to intervene.

This cause is now before this court on an application for a temporary restraining order, pending a determination of the appeal upon its merits, thereby involving the power of the court under sec. 5 of Art. V of the Constitution. Antuono v. City of Tampa, 87 Fla. 82, 99 So. 324. But the court sees fit to dispose of the appeal upon its merits, as has been done in a number of instances involving matters of public importance. Crawford v. Gilchrist, 64 Fla. 41, 69 So. 963; Carlton v. Mathews, 137, So. 815.

The act is first attacked upon the ground that the subject matter was not within the Governor's proclamation of June 6, 1931, calling the extra session during which this act was adopted. It is not contended that the act was not finally adopted by a "two-thirds vote of each house," as required by section 8 of Art. IV of the Constitution, but that certain [fol. 180e] amendments and the motion of concurrence in the House are not shown to have been adopted by a two-thirds vote. Whether this would or would not have been essential, if the act was outside the subjects named in the Governor's call, it is contended by appellees that the second subject dealt with in the Governor's proclamation, commencing with the words, "To provide new sources of revenue," is sufficiently broad to cover an act of this nature.

The ground of appellants' attack upon the constitutionality of the act which are most earnestly insisted upon in the arguments and briefs are briefly as follows:

1. That subsections 1, 2, 4, 6, 8 and 10 of section 5, as applied to the factual situation set forth in the amended bill and admitted by the motion to dismiss, create arbitrary and unreasonable discriminations between single store retail merchants and chain or multiple store retail merchants doing business in the same county, contrary to the "due process" and "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution, and the "equal civil rights" and "due process" clause of sections 1, 4 and 12 of the Declaration of Rights embraced in the Constitution of Florida.

2. That subsections 1 to 11 inclusive of section 5, as applied to the facts alleged in the bill, create arbitrary and unreasonable discriminations between retail merchants doing business in only one county, whether single store or multiple store merchants, and merchants such as plaintiffs doing business in different counties, contrary to the above designated constitutional provisions; and that section 11 of the act, undertaking to provide for county and municipal license taxes for retail merchants, is predicated upon the fees required by section 5, and is void for the same reasons.

3. That provisions of section 8, the last clause of section 5, and section 2 of said Act, exempting wholesale merchants (who remain subject to the license tax provided for by section 1197 Compiled General Laws), as applied to the "fac- [fol. 180f] tual situation" set up in the amended bill, creat- arbitrary and unreasonable discriminations against all chain or multiple retail merchants who own and operate warehouses, that stand in the same relation to their retail units as the wholesale merchant bears to single store retail merchants, contrary to the aforesaid provisions of the State and Federal Constitutions severally.

4. That the proviso contained in section 8 of said Act undertaking to exempt filling stations engaged exclusively in the sale of gasoline and other petroleum products, as applied to the "factual situation" set up in the amended bill, admitted by the motion to dismiss, creates an arbitrary and unreasonable classification and discrimination

against all other owners of retail "stores" as defined by said Act, contrary to the aforesaid provisions of the State and Federal Constitutions severally.

5. That on account of the invalidity of the several parts of said Act, as aforesaid, the elimination thereof would produce a result not intended by the legislature, and hence said Act must be declared void in its entirety.

6. That the Comptroller's attempted administration of the Act, as set forth in section 15 of the amended bill, undertaking to exempt furniture dealers, filling stations that sell tires and tubes, automobile dealers, cigar stores, restaurants, and sundry other classes of store operators, regardless of whether single store operators or chain store operators, creates arbitrary and unreasonable discriminations against the complainants and intervenors severally in this cause, contrary to the "due process" clauses and "equal protection of the laws" clauses of the State and Federal Constitutions severally as aforesaid.

The bill sets forth the origin and history of the development of the present day chain store or multiple store method of merchandising, which it alleges to be a natural and logical outgrowth of economic changes, especially those taking place since the World War, and charges that the act under review is a part of the World War, and [fol. 180g] charges that the act under review is a part of a widespread campaign to destroy chain store merchandising for the benefit of those merchants who refuse to adjust their businesses to conform to the changed economic conditions, and constitutes, under the guise of a revenue measure, an effort to destroy or arbitrarily burden a method of merchandising which has become an economic necessity, in order to eliminate waste and shorten the spread between the producer and the consumer, which it is alleged was pointed out by the Department of Commerce when the present President was at the head of that Department. That said Department stated that at that time about one-third of every American dollar spent in the stores of this country covered the actual cost of production, while the other two-thirds was absorbed in the process of distribution, whereas by a recent investigation by the Harvard Board of Business Research it has been found

that in the grocery field chain stores are able to operate on less than 20 per cent of the consumer's dollar, of which 1¾ per cent is net profit, leaving 80 per cent to go to the producer. Also, that similar changes have been accomplished in other fields by chain stores handling other classes of merchandise, thus going a long way towards eliminating the "tragic economic waste" of which Mr. Hoover spoke. That the policy so inaugurated had also been fostered by state governments, including Florida, by the enactment of the act of 1923 authorizing the formation of co-operative marketing associations, the declared policy of which was to eliminate speculation and waste between the producer and the consumer.

That under this Act, which became a law without the Governor's approval on July 3, 1931, Cohen Brothers, the largest department store in Jacksonville, covering a whole block, will only have to pay a license fee of $5.00, while complainant Winn & Lovett Grocery Co., would have to pay $40.00 per store on each of its 58 stores in excess of fifty stores, and lesser graduated amounts for each store [fol. 180h] below fifty; and Louis K. Liggett Company, on its 22 stores, $20.00 per store in excess of fifteen. That like arbitrary differences exist between the single store operator and Paxson's Inc., owning and operating seven shoe stores in different counties; which discriminations are based purely upon the number of roofs under which a merchant does business, and whether located in more than one county.

That George C. Blume owns and operates in Duval County thirty-seven grocery stores, known as "Whiddon's Stores", which are similar to and operated under the same circumstances and in the same manner as the twenty-three grocery stores in Duval County owned and operated by complainant, Winn & Lovett Grocery Company but that under the arbitrarily increased fee on stores operated in more than one county, embraced in the schedule set forth in section 5 of the Act, complainant is required to pay a State license fee averaging of $24.74 per store on each of its stores in Duval County, whereas the Whiddon Stores are only required to pay $13.78 per store on each of its stores located in the same county. That similar discriminations exist as against the other complainants, all of whom operate stores in more than one county, and that there is

no justification whatever for such discrimination, based as it is solely upon the fact that a merchant does business in more than one county in this State.

That said Louis K. Liggett Company operates its drug stores in several counties of Florida in the same way that other drug stores in the county are operated whether owned singly or otherwise. That the merchandise dispensed at the soda founts in such stores is very largely purchased locally, consisting of such items as mild, foodstuffs, ice cream, nuts, fruits, etc. That said company purchases cigars, cigarettes and tobacco from the manufacturer and shipments are made directly to the stores where needed, substantially in the same manner that those classes of goods are purchased and received by the owners of single drug stores. That some of the medical and toilet goods are purchased by the Company and collected in its principal [fol. 180i] warehouse in New York City, from which shipments in interstate commerce are made weekly or bimonthly on requisition by the individual stores located in Florida and other States. Such frequent shipments are necessary in order to permit more rapid turnovers, keep fresh goods in retail units and prevent the accumulation of old or shelf-worn stock. That the owner of a single drug store ordinarily buys his supply of medical and toilet goods from the manufacturers, jobbers or wholesalers and shipments are made either from some factory or from Florida wholesale warehouses. That no advantage results to said company by buying merchandise in large quantities and centralizing the same in a central warehouse, but the operation of such central warehouses involves the expense of the capital investment in such stock or merchandise, the interest, taxes and insurance thereon, investment in warehouse, and freight paid from the warehouse to the several stores. That none of these items of expense or burdens are borne by the owners of single drug stores who ordinarily purchase their merchandise locally from brokers or wholesalers. That none of the stores operated by this complainant increase the fire hazard or endanger the health or morals of the community or require increased or additional police protection different from the stores operated by other druggests doing a similar business. That the

twenty-two Liggett stores operated in Florida are burdened with State license fees in the aggregate amount of $355.00, whereas twenty-two individually owned drug stores competing with the Liggett stores are assessable with State license fees in the sum of only $110.00.

That complainant, Louis K. Liggett Company, has competition in Florida not only from individually owned drug stores, but also from a great number of drug stores individually owned but co-operatively affiliated with McKesson and Robbins Inc., wholesale dealers in drugs, toilet articles, and other goods, wares and merchandise, operating throughout the United States. That the drug stores so [fol. 180j] affiliated with McKesson and Robbins constitute what is commonly known as "voluntary chain" stores but which would be more properly designated as a "co-operative chain" store. That the aforesaid manufacturer-wholesaler-retailer combination in the production and distribution of drugs enables the individual single store owner affiliated therewith to sell at retail under the same terms and conditions as those established by chain store systems and department stores. That in such McKesson retail drug stores the consumer can find in almost any neighborhood in the United States drugs at the same prices and as extensively advertised as in chain drug stores. That McKesson and Robbins, Inc., have four wholesale distributing points in the State of Florida. That the wholesale distributor at the several points enters into contracts or arrangements with the owner- or operators of singly owned drug stores whereby such owners agree to purchase from such distributor in that locality in the State of Florida all of the drugs, toilet articles and other goods handled in drug stores or such of them as may be carried and sold by the distributing warehouse, in consideration of which the distributor of the McKesson system agrees to give to such drug store owner whatever benefits may arise from the volume resulting from his purchases and buying with the purchasers of all other retailers and drug store owners affiliated with said system, and also agrees and does furnish to each retail store owner the benefit of group advertising, including National Radio advertising and merchandising service supplied by and through said McKesson organization. That there are owned and operated in the City of Jacksonville, thirty-five individually owned drug stores affiliated with the

McKesson system, while at other points in the State of Florida there are numbers of stores thus affiliated, and that the total number of independent drug stores in the United States and elsewhere affiliated with said McKesson system is 57,000. That said McKesson retail stores are able to purchase merchandise substantially at the same price and on the same terms as your orator, and the total sales made by such stores in Florida amount to a great [fol. 180k] many times the total sales of the twenty-two stores operated by said Liggett Company, and enjoy all of the advantages accruing from quantity buying, and none of the disadvantages resulting from capital invested in quantity purchased, in warehouses, insurance, etc. Nevertheless, each of such individually owned drug stores affiliated with the McKesson system is required by said Act to pay a State license fee of only $5.00 each, whereas complainants stores must pay a State license of $16.00 each, thus imposing an arbitrary and oppressive burden of taxation upon complainant only because it owns and operates a number of stores under one ownership and management.

The bill also alleges the methods pursued by the Winn and Lovett Grocery Company in the operation of its fifty-eight grocery stores in various counties of the State, and alleges that they are operated in the same manner that similar grocery stores are operated by owners of only one such grocery store; and that the operation of such stores does not increase the fire hazard or endanger the health or morals of the community or require increased or additional police protection any more than stores individually owned. That there is very keen competition in the grocery business in Florida, although many chain grocery store owners operate in the State. That the "Better Food Stores" are a group of individually owned grocery stores affiliated with Lewis-Chitty Consolidated Grocery Co., which does a large wholesale grocery business in the City of Jacksonville, with branch wholesale houses at Orlando, Tampa, Cocoa, Miami and other points. That the name "Better Food Stores" is a trade name belonging to a corporation whose corporate name is "Better Food Stores Inc." That one of the organizers of said corporation is A. B. Chitty, the President and controlling stockholder of said Lewis-Chitty Consolidated Grocery Co. That the formation of such co-operative groups as said "Better Food Stores" has been encouraged

by the discrimination of said Act. That on June 18, 1931, another grocery corporation was organized under the name of "Florida Food Stores, Inc.," by certain individuals in [fol. 1801] the grocery business at Daytona Beach, Florida, and under that name a number of individually owned grocery stores have been affiliated for co-operative purchases in the same way as the aforesaid group operating under the name of "Better Food Stores". And in like manner other co-operative groups of independently owned grocery stores have been formed under trade names, or otherwise since the passage of said Act, being assured that they could so operate without being subjected to the discriminatory graduated license fees provided by the Act. That although the said "Better Food Stores" group were organized on June 8, 1931, about the time said Act was passed, or introduced into the legislature, the same has had a very rapid growth, there being forty-two individually owned grocery stores in the Duval County group, and other groups have been formed at several other points where the said Lewis-Chitty Company has branches of its wholesale grocery business. That by such affiliated and co-operative organizations single grocery stores owners have adopted the best feature of chain store merchandising and have secured substantially all the benefits derived therefrom, while at the same time they have avoided the burdens of capital investments, insurance, etc., incident to the carrying of a large stock in a central warehouse, such as is maintained by the Winn & Lovett Grocery Company in Jacksonville and Sanford. That the latter company also finds it necessary to maintain a force of employees and a fleet of trucks to deliver merchandise from its warehouse in Jacksonville to its retail units in Duval County and outlying towns, whereas the individually owned stores affiliated as "Better Food Stores" have no such expense and can obtain daily deliveries by motor trucks as needed from the Lewis-Chitty Consolidated Grocery Company with which they are under contract. That such co-operative groups are not local merely to Jacksonville and other parts of Florida, but such methods of co-operative merchandising prevail generally throughout the United States. That the largest organization of independently owned grocery stores in the United States is known as "The Independent Grocers Alliance", which organization now embraces thirty-eight [fol. 180-m] States, has one hundred and thirty jobbing or

supply depot centers and has affiliated with it 14,000 retail grocery stores, with a buying power of $500,000,000.00 per year. That the scheme of organization and affiliation of independent grocers alliance and the owner of individual grocery stores is very similar to the relation which exists between the memebers of said Better Food Stores and the Lewis-Chitty Consolidated Grocery Company or its intermediary, Better Food Stores, Inc. That the retail grocer affiliated with the independent grocers alliance pays $3.50 per week to the independent alliance jobber, who in turn furnishes the retailer with groceries at reduced prices, and also newspaper advertising, copy mats, display cards, price-posters, and various up-to-the-minute merchandising helps. That the newspaper advertising is placed by the I. G. A. wholesalers in his local paper, but the copy and layouts are furnished by the I. G. A. advertising counsel. That the I. G. A. advertising appears in 283 dailies and 454 weeklies, and calls for an annual expenditure of $757,000.00, in addition to which there is an annual expenditure of $250,000.00 for National magazine and Radio advertising. That there are in Florida, affiliated with the independent grocers alliance eighty-three retail grocery stores in Tampa, St. Petersburg, and on the West Coast of the Peninsula who get their supplies from Perkins and Sharpe, whose warehouse is situated in Tampa and who are the I. G. A. Jobbers in that territory. That there are many other voluntary chains or co-operative groups in the United States not only in the grocery business, but in other lines and independent store owners so operating have adopted the best features of modern merchandising promulgated by chain or multiple store operators, which features are set forth with some detail in the bill. That although members of such voluntary chains or co-operative groups are doing business in the same way, the Act under review undertakes to impose [fol. 180n] excessive burdens of State license taxes upon complainants and other chain store operators similarly situated, while not placing the same corresponding burdens upon members of said voluntary chains or co-operative groups. That the legislature knew that the independent grocers alliance was operating extensively in Florida before said Act was passed and also knew that complainants were also operating several drug, grocery and shoe stores

in Florida and had been for some years prior to the passage of said Act.

That complainant, Paxson's Inc., was organized in 1929 under the laws of the State of Florida, with a capital stock of $40,000.00, its stockholders and officers being residents of this State. That it owns and operates eight retail shoe stores, one in Georgia and seven in Florida, and conducts the business in its several stores in the same manner as other shoe stores are conducted in said several localities, attempting however, to give customers better service and better values for their money, which are mere matters of competitive merchandising equally available to all other shoe merchants, whether owning only one store or many stores. That they carry comparatively the same stock of goods in each of its stores and does not own or maintain any warehouses, but buys its goods direct from the factories situated in different parts of the United States from which factories shipments are made direct to each individual store. That it buys shoes on substantially the same terms as other shoe merchants doing business in different parts of the State, whether operating single stores or many stores. That in Jacksonville, where one of the stores is located, there are shoe businesses operated in more than one location, but in no other county, and that in Cohen's department store in Jacksonville there are several departments for different grades of shoes, combined stocks of which are greater in value than the combined value of all the stocks of complainants in its seven Florida shoe stores. That neverthe-
[fol. 180o] less, said large department store, including several shoe departments, will be assessed under the Act with a arbitrary license fee of only $5.00, whereas this complainant will be assessed with an arbitrary State license fee in the sum of $13.60 on each of the said shoe stores, in addition to which complainant will be required to pay $3.00 per thousand license tax on the value of its merchandise carried in its several stores plus a County license of 25 per cent of the State tax and plus a municipal license tax of another 25 per cent of the State tax. That there are several other singly owned shoe stores in the City of Jacksonville which each carry a larger stock and do a larger business than complainant in all of its three stores located in said City, yet said large single shoe stores are chargeable with annual State license fees of only $5.00

each as compared with an annual State license fee against each of complainant's stores of $13.60. The bill refers to the differences between chain stores and independently owned units catalogued by the majority opinion of the Supreme Court of the United States in the case of State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 75 L. ed., 1248, decided May 18, 1931, and alleges that regardless of what may or may not have been the then conditions of merchandising and methods used by chain store operators in the State of Indiana, such conditions and such differences do not prevail in Florida. Each one of the differences set forth in the majority opinion in the cited case is taken up in detail by the bill and facts alleged with reference to each, tending to show that such differences do not exist in this State.

The bill also alleges that the defendant, Hon. Earnest Amos, Comptroller is undertaking to administer said Chapter 15624 in a manner so as to create sundry exemptions and exceptions as to the merchants to whom it shall be applied; that the comptroller holds that wholesale grocery concerns are not covered by the new Act but continue subject to Section 1197 C. G. L. paying only $1.50 [fol. 180p] per thousand on its merchandise carried instead $3.00 per thousand as is charged to complainant Winn & Lovett Grocery Co. upon merchandise carried in its warehouses, pursuant to the new Act; that the comptroller construes said Chapter 15642 to be inapplicable to furniture dealers, regardless of whether they operate one retail store or many retail stores, on account of the fact that Section 1149 C. G. L. provides a special graduated license tax upon furniture dealers dependent upon capital stock invested in such business. That in like manner the comptroller and the several tax collectors of the State acting upon his instructions, with the advice of the Attorney General, undertake to exempt from the provisions of said new Act, not only filling stations engaged exclusively in selling petroleum products, but also to exempt filling stations selling those products plus tires and tubes, holding that Section 1061 C. G. L. provides a graduated tax for tire and tube dealers depending upon the population of the town or city where located. That an exemption is also made in behalf of automobile dealers, whether second-hand

or otherwise, because Section 1056 C. G. L. provides a graduated tax upon merchandise of that kind. That in like manner the comptroller is undertaking to exempt merchants dealing in cigars and tobacco who are taxed by Section 1120 C. G. L. Similar allegations are made with reference to hay, feed and grain dealers; restaurants and cafes, etc. That Chapter 15624 carries its own definition as to who shall be subject to the license taxes sought to be imposed thereby and repeals all laws and parts of laws in conflict therewith, and that if said Act is valid, the said exemptions sought to be allowed are unauthorized and would operate to deprive complainants of the equal protection of the law.

The bill also alleges that the Act operates to place an undue burden upon the interstate commerce business of complainants.

It is further alleged that the complainants have tendered and offered to pay the taxes lawfully assessable against [fols. 180q-s] them under the law existing prior to the passage of Chapter 15624 but that the tax collectors, acting under the advice of the comptroller declined to accept the same, and threatened to cause the complainants and their store managers to be prosecuted for doing business without license and to impose the 25% penalty provided in Section 4 of said Act. Wherefore, complainants pray that the court issue its writ of injunction restraining the defendants from attempting to enforce said Act of 1931 and from interferring with lawful procurement by complainant of the proper licenses under the prior law, until further order of this court, and that on final hearing such injunction may be made permanent.

The defendants filed a motion to dismiss the amended bill, which motion stated that Chap. 15624 was duly enacted; does not deny complainants equal protection of the laws; that the classification of stores made for taxation purposes by the Act is unreasonable and operates equally and uniformerly on all stores similarly situated. That the legislature has unlimited power and discretion in the matter of levying excise taxes, except that such taxes shall be geographically equal and uniform, and that the taxes imposed by the Act are geographically equal and uniform, and do not violate any provision of either the State or Federal Constitutions. The Circuit Court rendered an

order, after argument of the motion, denying the application for injunction and granting the motion to dismiss the bill, from which order this appeal was taken.

[fol. 181] DISSENTING OPINION

BROWN, J. (Dissenting):

In discussing the power of the legislature to classify persons and things, it was said by this Court, speaking through Mr. Chief Justice Taylor, in State vs. Jacksonville Terminal Co., 41 Fla. 363, 27 So. 221, said that the equal protection clause of the Fourteenth Amendment to the Federal Constitution "does not preclude legislation reasonably classifying persons and things, and that generally it only requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. And the test of the reasonableness [fol. 182] of a classification is that 'it must be based upon some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.'" Citing Mahoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 S. C. R. 594, and Dell v. Marvin, 41 Fla. 221, 26 So. 188. See also Stripling v. Thomas, 132 So. 824, S. A. L. Ry. Co. vs. Simon, 56 Fla. 545, 47 So. 1001.

This Court, speaking through Mr. Justice Strum, in Sheip Co. vs. Amos, 130 So. 699, said:

"The province of the judiciary in considering an objection of the nature thus stated, as applied to an excise, is limited. In the direct imposition of a state excise upon taxable privileges, the Legislature exercises a power of extensive scope. Organic requirements as to uniformity and valuation, applicable to ad valorem taxes, do not apply to excises, since the latter are not regarded as a "tax" within the meaning of constitutional limitations requiring uniformity of rates and just valuations. Jackson v. Neff, 64 Fla. 326, 60 So. 350; Hiers v. Mitchell, 95 Fla. 345, 116 So. 81. In the imposition of excises, the only organic limitations upon the State are that due process, equal protection, and contract rights shall not be burdened nor federal functions interfered with. Therefore there must be a rea-

sonable basis of classification, and there must be geographic, as distinguished from intrinsic, uniformity. Amos v. Matthews (Fla.) 126 So. 308; Amos v. Gunn, 84 Fla. [fol. 183] 285, 94 So. 615; Jackson v. Neff, supra; Peninsular Casualty Co. vs. State, 68 Fla. 411, 67 So. 165; Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583. See also, Newell v. Green, 159 N. C. 462, 86 S. E. 291. Unless the classification, or the amount of the tax, is purely arbitrary and unreasonable under every conceivable condition in practical affairs, the courts will not interfere.

"It is held in the federal courts that the mere fact that an excise tax, imposed for revenue purposes, operates to practically suppress the business taxed, does not render an Act of Congress unconstitutional, and that it is not a part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed."

"The rule in this state, however, is somewhat more stringent. This court fully recognizes the doctrine, long established, that the judicial department cannot prescribe to the legislative department limitations upon the exercise of its existing powers. That doctrine however, is consistent with the further doctrine adopted by this Court that, although there is no express limitations upon the power of the Legislature to provide for a tax on licenses, nevertheless the organic requirements of *due process* and *equal protection* must be observed in imposing such a tax. See Roach v. [fol. 184] Ephren, 82 Fla. 523, 90 So. 609.

"The rule in this jurisdiction was thus stated in State ex rel. Bonsteel v. Allen, 83 Fla. 214, 91 So. 104, 105, 26 A. L. R. 735:

"'While it is within the power of the courts to declare laws lev-ing license taxes void because of the unreasonable and arbitrary exercise of the state's power either in the classification or in fixing the amount of the license, such power will not be exercised unless the amount of the license tax is so great, or the classification so palpably arbitrary as to be beyond the necessities for the legislation, or equivalent to an impa*ri*ment of the constitutional rights or property, or tend to prevent a great number, if not all persons, from pursuing otherwise lawful occupations which do not impair public safety, public health, or destroy property.'"

The application of this clause of the Fourteenth Amendment to state taxation statutes is thus stated in the majority opinion by Mr. Justice Roberts, in the recent case of State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 75 L. ed. 1464, 51 S. C. 540:

"The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the law does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, [fol. 185] or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. C. 232, 33 L. ed. 892, 10 S. Ct. 533; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Brown-Forman Co. vs. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction. American Sugar Ref. Co. vs. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 S. Ct. 43, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & L. Co., 240 U. S. 342, 60 L. ed. 679, L. R. A. 1917A, 421, 36 S. Ct. 370, Ann. Cas. 1917B, 455; Qyong Wing v. Kirkendall, 223 U. C. 59, 56 L. ed. 350, 32 S. Ct. 192. As was said in Brown-Forman Co. v. Kentucky, supra:

'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulations or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

It is not the function of this court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted [fol. 186] the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear."

In the opinion of the four dissenting Justices, as pertains to the general principle involved, it was said:

"It is settled that the power of the State to classify for purposes of taxation is of wide range and flexibility; but that, while the difference upon which the classification is bases need not be great, mere difference is not enough. Classification, to be legitimate, must rest on some ground of difference having a reasonable and just relation to the object of the legislation. All persons similarly circumstances must be treated alike. Louisville Gas & E. Co. vs. Coleman, 227 U. S. 32, 37, 72 L. ed. 770, 48 S. Ct. 423, and cases cited."

In the majority opinion, Mr. Justice Roberts said that the appellants had produced evidence to prove that there are many points of difference between chain stores and independently operated units, which justified the classification made by the Indiana Act, naming them. That these differences exist in Florida in so far as appellants' businesses are concerned, is denied by the bill in this case. Indeed, the existence of these differences in Indiana was doubted by the majority members of the Court. In commenting on this feature of the majority opinion, the dissenting opinion says:

"In the State of Indiana there are approximately 44,000 retail stores engaged in the same general lines of business, only eight per cent of which are so-called 'chain stores.' [fol. 187] Among them are single stores each of greater value than all the stores of appellee combined, and each doing a business in excess of all that done by appellee. For example, there are two large department stores in the City of Indianapolis, each doing a business of more than $8,000,000 per annum, one operating 124 separate departments and the other, 86 separate departments, but each pays a license fee under the statute of only $3.00 per annum; while appellee, owning 225 separate stores and doing a total business of approximately $1,000,000 per annum, pays license fees of $5,443 per annum—eighteen hundred times as much! Each of several owners of a large number of stores (145 in one instance), who happens to have only one store in Indiana, pays a license *fee* of $3, contrasted with the payment of $25 for each store over

twenty owned by appellee. Appellee, upon 205 of his stores, pays the aggregate sum of $5,125; while the proprietors of 205 stores, held and operated separately, pay in the aggregate only $615, although they or some of them may be of equal or greater value, equally well or better located, doing as much or more business, and producing as much or more income. The evidence further shows that a "cooperative volunteer chain" consisting of several hundred stores in Indiana paying an annual license fee of only $3 each, operates under an association called the Independent Grocer's Alliance. The association carries on co-operative buying and advertising for the benefit of the members of the group; and it seems clear that as to most, if not all, of the advan-[fol. 188] tages said to be enjoyed by the chain stores the volunteer co-operative group occupies a position of equality.

"These are obvious and flagrant discriminations which put upon the act the clear stamp of unconstitutionality, unless the differences relied upon are germane to, and reasonably sufficient in substance to sustain, the proposed imposition of license fees of such unequal amounts upon different persons following identical occupations.

"What, then, are the differences, or so called advantages, relied upon to justify the classification? They were, in their strongest aspect, stated by an expert witness called by the appellants in support of the act, as follows: The ability of the chain store to make large quantity purchases to pay cash and thus obtain the advantage of discounts; skill in buying so as to avoid either overstocking or understocking; warehousing in, and distribution from, a single warehouse for numerous stores; large capital with the advantages flowing therefrom; certain pricing and sales policies resulting in slightly lower prices on the part of the chain stores as compared with single stores; more rapid turn-over of goods; cheaper and better advertising; superior management; standardization in the matter of display; standardization of store management; and similar elements thought to have a beneficial effect upon the disposition of goods.

[fol. 189] "But the effect of this enumeration of supposed advantages is completely swept away by the testimony of the same witness on cross-examination, which stands upon the record, without dispute, that they are not confined to the chain stores, but are enjoyed as well by such of the

favored taxpayers as are engaged in large business, whether in a single establishment or in many establishments.

"Every advantage that I have spoken of as relating to the chain group is that which inheres, primarily, in volume and management without respect to whether it is involved in a chain group or in a single store. Good management makes for volume and volume makes for the possibility of making or acquiring more capital, and more capital makes for the possiblity of employing the highest grade of experts, so that there is a constant intercommunication of revolving. I would find the same advantage inhering in a large department store over a smaller one. Every quality that I have enumerated as going to the manner of organization relates itself, primarily, to their being a sufficient capital structure and volume of business to permit it to be carried on, and I would add management in that it is an essential part of it.

* * * * * * *

" 'Q. So that it does not relate itself to the form of organization—whether they are administering fifty or a hundred stores, or administering one store?

A. No, no.

Q. The fact that it is administering multiple owned stores has nothing to do with it, but it is the fact that it is administering a large business that develops the situation [fol. 190] that you have referred to?

A. That is true. But I might add that the management of a large number of stores may contribute to the more rapid increases in the size.

Q. That is true. But I might add that the management of a large number of stores may contribute to the more rapid increases in the size.

Q. Just as the management of a large unit store, with many departments, may develop the ability to strengthen and enlarge those departments?

A. Yes.

Q. And the problem would be identical, wouldn't it, in the case of Macy or Gimbel—or, taking it locally in connection with Ayres or Block?

A. Yes, I would say the problem would be the same. There is no difference in the functions that are performed here—the function of retailing.'

"It thus appears that the advantages attributed to the chain store lie not in the fact that it is one of a *number* of stores under the same management, supervision or ownership, but in the fact that it is one of the parts of a *large business*. In other words, the advantages relied upon arise from the aggregate size of the entire business, and not from the number of parts into which it is divided. For the want of a valid ground upon which to stand, therefore, the classication should fail, because it is made to depend not upon size or value or character, amount of capital invested or income received, but upon the mere circumstances—wholly [fol. 191] irrelevant so far as any of the advantages claimed are concerned—that the business of one is carried on under many roofs, and that of the other under one only. Reduced to this single detail in difference, what fairly conceivable reason is there in the policies or objects of *taxation* which gives countenance to the requirement that the former shall make an annual contribution to the revenues of the state eighteen hundred times as much as the latter? A classification comparable in principle would be to make the amount of an income tax depend upon the number of sources from which the income is derived, without regard to the character of the sources or the amount of the income itself.

"Since the supposed differences thus are reduced to the one of number only, and, since that turns out to be irrelevant and wholly without substance, it follows that the act is a 'clear and hostile discrimination' against a selected body of taxpayers, Bell's Cap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 S. Ct. 533—a mere subterfuge by which the members of one group of taxpayers are unequally burdened for the benefit of the members of other groups similarly circumstanced. All of which is to say that the legislature has misapplied its powers to classify with the result of reaching an end forbidden by the [fol. 192] 14th Amendment.

"To this situation the language of Mr. Justice Field in Santa Clara County v. Southern P. R. Co. (C. C.) 9 Sawy. 165, 18 Fed. 385, 399, seems peculiarly applicable:

"'Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the Amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general

legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing the result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, levelled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the [fol. 193] world.'

"It seems plain enough that we have in the present case 'a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result.' "

There are certain distinctions between the Act here under review and the Indiana Act, considered in the above cited case. The Indiana act appears to have applied to all stores, whether wholesale or retail, while the Florida Act applies only to retail stores, the stocks carried therein, and held in storage to be sold in or through such stores. There is a difference also in the amount of the license fees. Under the Indiana Act, the license fees run from $3.00 for a single store to a maximum of $25.00 for each store in excess of twenty stores when owned and operated under a single ownership whereas under the act here in question the fees run from $5.00 to $50.00. But the most marked difference between the two acts is that the Florida act provides a considerably higher license fee for the same number of stores (in excess of one store) under a single ownership where any of such stores are located in more than one county.

The North Carolina Act, which was also upheld by the Federal Supreme Court by a memorandum decision, on October 26, 1931 (Great Atlantic & Pacific Tea Co. vs. Maxwell) did not embrace an ascending graduated scale of

fees, but merely provided for a license tax of $50.00 on each store in excess of one store where two or more stores were under the same management, supervision or ownership, the [fol. 194] motion to dismiss the amended bill in this case, like a demurrer, admits all facts well pleaded in the amended bill. Taking these facts as true, as we must in reviewing the action of the lower court on the motion to dismiss, my conclusion is that the court below erred in granting such motion and in denying the temporary restraining order. For under the principles heretofore enunciated by this court, and by the Supreme Court of the United States, including the recent case of State Board of Tax Commissioners v. Jackson, supra, said Chapter 15624 would be unconstitutional as applied to these appellants, if the facts alleged in the amended bill are true, on the ground that as applied to appellants the act constitutes an arbitrary and unreasonable classification for taxation purposes, contrary to the due process and equal protection clauses of the Federal Constitution and similar provisions in the preamble and sections 1, 4 and 12 of the Declaration of Rights of our State Constitution. It is my opinion that the facts alleged in the amended bill are sufficient to require the defendants to answer, and that the motion to dismiss was erroneously granted.

It would also appear that those provisions of the act which require increased or higher license fees on multiple stores under the same general management, supervision or ownership, where the same are located in more than one county, are so arbitrary and unreasonable on their face as to render them unconstitutional and to require that they be regarded as eliminated from the act. We cannot see where [fol. 195] they have any just or reasonable relation to the object of the act. Under these provisions for instance, a man owning the same number of stores as another man would have to pay a much higher tax per store if he had one of them in an adjoining county, regardless of value or volume of business. This is also contrary to that geographical uniformity which is referred to in Sheip Co. vs. Amos, supra. We cannot see wherein county lines are material in a State license statute of this nature. Any given number of stores located in a populous county might do a much larger business than the same number scattered

throughout a number of small counties, sparsely populated. Under this act the owner of 37 Whiddon Stores in Duval County, referred to in the bill, would have to pay total license fees amounting to $510.00, or $13.78 per store. If he decided to located one store at Fernandina, the addition of this one store would make him liable under the act to license fees on 38 stores, totaling $755.00, or $19.60 per store. Thus by establishing one store across the county line his taxes would be increased $250.00, or nearly 50%. His 37 stores in Jacksonville would remain exactly as before, yet the tax on them would be increased nearly 50% merely because one store was opened in an adjoining county. Such artificial and law made disparagement of the rights of one citizen and tax payer in favor of another certainly does not comport with our constitutional guarantees of "equal civil rights" and "equal protection of the laws." Such an arbitrary classification in a state license tax based on mere county lines, is "classification gone wild."

"The citizen's right to pursue any lawful business is [fol. 196] property that cannot be taken from him without due process of law, and is one of the privileges of a citizen of the United States of which he cannot be deprived without invading his liberty. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions on lawful occupations. This was the holding in State v. Rose, 97 Fla. 710, 122 So. 225. In the opinion by Mr. Justice Ellis in the Rose case, the case of Marymount v. Nevada Banking Board, 111 Pac. 295, 32 L. R. A. (N. S.) 477, was cited, in which case the Court said that "The right to do a grocery or drygoods business is available to all citizens and no grant from the sovereign is essential to its existence." Some others of our Florida cases dealing with the subject of the equal protection of the laws, or as our Declaration of Rights expresses it, "all men are equal before the law," are State v. Bryan, 87 Fla. 57, 99 So. 327; Stewart v. Stearns & Culver Lumber Co., 56 Fla. 570, 48 So. 19, 24 L. R. A. (N. S.) 649; Harper v. Galloway, 58 Fla. 255, 51 So. 236, 26 L. R. A. (N. S.) 794, 19 Anno. Cases 235; S. A. L. R. Co. v. Simon, 56 Fla. 545, 557, 47 So. 1005; Ex Parte Messer, 87 Fla. 92, 99 So. 330; Ex Parte Smith, 128 So. 864; Teuton vs. Thomas, 128 So.

330; Motes v. Hagan, 132 So. 676; L. & N. R. Co. v. Amos, 98 Fla. 350, 124 So. 745; State ex rel. Davis v. City of Stuart, 97 Fla. 69, 120 So. 335.

There is very little, if any conflict, in the statement of the general principles which must be observed in order for legislative classifications to square with the constitution, between the majority and minority opinions of the Federal Supreme Court in the Jackson case, above quoted from. The minority opinion in effect supplements the statement of the doctrine enunciated in the majority opinion by adding thereto a qualification which has long [fol. 197] been recognized by this court, as a reading of the cases in the preceding paragraph will show, i. e., that such classification should not be merely arbitrary, but the differences on which it is based must have some just and reasonable relation to the subject or object of the legislation and the attempted classification. See the text of the able opinion of Mr. Justice Whitfield in the Simon case, supra, 56 Fla. 554 to 557, 47 So. 1002 to 1005. So, in order to get a complete view of the law on this subject, both the majority and minority opinion in the Jackson case must be considered. The chief difference between the two opinions lies in the analysis of the facts and the application of the law to the facts. The writer is further inclined to the view that under our former decisions, as applied to the state of facts alleged in the bill, the act here in question creates an arbitrary classification as to render it unconstitutional and void.

I am, however, inclined to concur in the conclusion reached by the learned Circuit Judge that the statute here under review was lawfully enacted, on so far as the same was attacked by the bill on the ground that the subject dealt with by it was not within the Governor's call. It is not contended that the act, as finally adopted, was not adopted by a "two-thirds vote of each house," as required by section 8 of Art. IV. of the Constitution. The contention is that certain amendments and the motion of concurrence in the House were not adopted by a two-thirds vote.

My view is that the order of the court below dismissing the amended bill and denying the application for temporary injunction should be reversed, and the cause remanded for further appropriate proceedings.

Ellis, J., concurs.

[fol. 198] IN SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1932

LOUIS K. LIGGETT COMPANY, et al., Appellants,

vs.

ERNEST AMOS, as Comptroller of the State of Florida, et al., Appellees

An Appeal from the Circuit Court for Leon County

JUDGMENT—April 4, 1932

This cause having heretofore been submitted to the Court upon the transcript of the record of the decree herein, and briefs and arguments of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and [fols. 199 & 200] decreed by the Court that the said decree of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellees do have and recover of and from the Appellants their costs by them in this behalf expended, which costs are taxed in the sum of $—, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice Terrell was this day ordered to be filed.

[fol. 201] IN SUPREME COURT OF FLORIDA

[Title omitted]

AMENDED PETITION FOR REHEARING—Filed May 4, 1932

Come now the Appellants in said cause, and respectfully petition the Court to grant a rehearing in said cause, on account of the following omissions and causes why, as the appellants believe, the majority opinion and decree of the Court of April 4, 1932, are erroneous:

I

The majority opinion sustaining and upholding the classifications and discriminations created by sub-sections 1, 2, 4, 6, 8 and 10 of Section V of Chapter 15624, Laws of Florida, 1931, is predicated upon the following pronouncements contained in said opinion:

[fol. 202] "The record discloses material points of difference between chain stores and independently owned units. Such differences consist in method of management, group control of store operation, frequent turn over, cooperative advertising, cooperative buying, suitable location, display of goods, training of employees, the combination of wholesale and retail functions under one control, and serving the public in the manner the public desires to be served. These differences were ample basis for the classification complained of."

"Appellants assert that like advantages are available to independent owned stores and when properly applied will produce the same or similar results. This assertion may be true in part but in the nature of things it cannot be true as a whole. It is common knowledge that the chain store possesses many distinguishing features that give it an advantage over the independent store dealing in the same commodities. Its method of integration for purposes of cooperative buying, community advertising, traffic in 'selling talk', displaying, serving the public, unqualified control of wholesaling and retailing, and commanding capital could, under no circumstances become available to the independent store with such results as flow therefrom to the chain store."

Appellants respectfully suggest that the aforesaid pronouncements seem to partake of the nature of a judicial edict, which disregards the specific facts and ultimate facts [fol. 203] to the contrary set up in appellants' sworn bill and petitions of intervention, which facts are admitted by appellees' motion to dismiss.

See—

Payne v. Central P. R. Co., 255 U. S. 228, 232, 65 L. ed. 598, 601;

Hill v. Wallace, 259 U. S. 44, 61, 66 L. ed. 822, 827;

National Remedy Co. v. Hyde, 50 Fed. (2) 1066;

Hopkins Fed. Eq. Rules (7th ed.), p. 198.

The Supreme Court of the United States has so often held that a demurrer to a bill, or a motion to dismiss a bill, admits all averments well pleaded that the Court seldom, if ever, cites Fed. Eq. Rule 29 in that behalf.

The following are additional decisions of that Court where the Court reversed lower Courts because, on demurrer or motion to dismiss, bills for injunction, the averments having been admitted, were erroneously dismissed and injunction denied:

Ft. Smith & Western R. Co. v. Mills, 253 U. S. 206, 209, 64 L. ed. 862, 863—Railroad Strike.

Street v. Lincoln Safe & Deposit Co., 254 U. S. 88, 89, 65 L. ed. 151, 152—Liquor Storage.

Regal Drug Corporation v. Wardell, 260 U. S. 386, 388, 67 L. ed. 318, 320—Liquor License Tax.

B. & O. R. Co. v. U. S., 264 U. S. 258, 262-263, 68 L. ed. 667, 673—Order I. C. C.

Buck v. Kuykendall, 267 U. S. 307, 314, 69 L. ed. 623, 626—Use Motor Vehicles.

Geo. W. Bush & Sons Co. v. Maloy, 267 U. S. 317, 324, 69 L. ed. 627, 628—Use Motor Vehicles.

Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 335, 69 L. ed. 982, 985—License Tax.

Anderson v. Ship Owners Assn., 272 U. S. 359, 364, 71 L. ed. 298, 302—Anti Trust Violation.

L. G. & E. Co. v. Coleman, 277 U. S. 32, 36, 72 L. ed. 770, 773—Privilege Tax.

In this behalf appellants respectfully request attention to the averments of § XIV of the bill (R. 60 to 75); also in § IX (R. 40 to 45); and § XI of the bill (R. 47 to 56); showing that "individually owned" store merchants not only may, but in Florida are now actually utilizing the same methods as chain stores, and are actually enjoying the same advantages; and that there is a great diversity of methods of merchandising, financing, advertising and the like among chain stores merchants themselves; all of which matters are admitted by the motion to dismiss.

Appellants respectfully further suggest that the pronouncements of the Court above quoted appear to be comparable to legislative fiats, condemned by the Supreme Court of the United States. For example

Manley v. Georgia, 279 U. S. 1, 6,

where it is said:

"A statute creating a presumption that is arbitrary or [fol. 204] that operates to deny a fair opportunity to repel it violates the due process clause of the 14th amendment. * * * Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty and property."

And more recently, the Supreme Court, following the Manley case, affirmed the same rule in

Heiner v. Donnan, 76 L. ed. (Adv. 501, 506, 507 and 508), decided March 21, 1932,

where the Supreme Court said:

"That which is not in fact the taxpayers' income cannot be made such by calling it income."

"A statute creating a presumption which operates to deny fair opportunity to rebut it violates the due process clause of the 14th Amendment."

"If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law."

And appellants respectfully suggest that the above quoted pronouncements of the Court in the case at bar have operated to deny appellants any opportunity to establish by proof the facts set up in their sworn bill and in their sworn petitions of intervention.

[fol. 205] Appellants respectfully further mention that the majority opinion in this cause apparently approves Mr. Webster's definition of "due process" in the Dartmouth College case, and the Supreme Court of the United States has done likewise in many cases, notably

Hovey v. Elliott, 167 U. S. text 418.

Nevertheless it appears to appellants that the majority opinion in this cause overlooked the full significance of Mr. Webster's definition, for he said:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns, which

proceeds upon inquiry, and renders judgment only after trial."

Whereas the Court's pronouncements above quoted shut off all "inquiry" and render judgment before trial.

The above quotations show that the majority opinion relies upon what is said to be a matter of common knowledge as to methods of merchandising, including methods of buying and financing, training of employees, etc., whereas the Supreme Court of the United States has in several well considered decisions pointed out that if such facts exist they may not be judicially noticed by the Court "and given effect without pleading or proof." See

First Natl. Bank v. Anderson, 269 U. S. 341, 354, 70 L. ed. 295, 305;

I. C. C. v. L. & N. R. Co., 227 U. S. 88, 93, 57 L. ed. 431, 434.

In Chaselton Corporation v. Sinclair, 264 U. S. 543, 548-549, 68 L. ed. 841, 844, the court pointed out that it might take judicial notice of changed conditions as a "ground for laying down a rule of law." Nevertheless the Court pointed out that the extent of such changes and the dates when they occurred are obviously facts which "should be carefully ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here. The evidence should be preserved so that if necessary it can be considered by this Court." Accordingly the case was reversed in order that such proceedings might be had.

In the case at bar appellants are given no such opportunity. The case of

Bronk v. Chas. H. Scott Co. (7 C. C. A.) 211 Fed. 338, 2nd headnote, and text supporting the same,

is another case squarely in point. See also

Hume v. Wright (Mo.), 274 S. W. 741.

See also:

Jones Commentaries on Evidence, 2nd ed. Vol. I, Par. 476.

These results appellants respectfully submit deprive them of their rights and property without due process of law,

and without the equal protection of the laws, within the definition of the recent case of

Brickerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107, L. ed. headnotes 3, 4 and 8.

II

The sworn bill in this cause and the sworn petitions of intervention present a different factual situation and a [fol. 206] materially different statute from the factual situation and statute involved in the Indiana case, 283 U. S. 527. Moreover, the Supreme Court of the United States has clearly indicated in subsequent decisions an intention to restrict that decision to the particular case before the Court, rather than to regard it as creating general rules of law for general application in license tax cases. See

New State Ice Co. v. Liebmann, 76 L. ed. (Adv. 484, 485),

where the Court said:

"The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. * * *

The principle embedded in our constitutional system that there are certain essentials of liberty with which the State is not entitled to dispense in the interest of experiments. * * *

The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection."

And in the case of

Heiner v. Donnan, 76 L. ed. (Adv. text 518),

the minority opinion insisted that the Indiana chain store [fol. 207] case and the North Carolina Chain store case should control. Nevertheless the majority opinion held otherwise, as the quotations therefrom supra, show.

III

The cases chiefly relied upon in the majority opinion in this case can, as appellants believe, be easily distin-

guished from the case at bar. For example, the majority opinion cites two territorial cases, one from Hawaii, and the other from Alaska. As to those cases it may be observed first, that the 14th Amendment does not apply to territories of the United States. See

Farrington v. Tokushige, 273 U. S. 284, 299, 71 L. ed. 646, 651.

The Fifth Amendment does apply, but that amendment does not carry any "equal protection of the laws clause," which is one of the chief matters relied upon by the appellants in this case. The power of Congress over territories is given by Art. 4, sec. 3, clause 2 of the Constitution, and is absolute. See

U. S. C. A. "Constitution," Part 2, pp. 423 and 424.

A further distinction as to the case of Toyota v. Territory of Hawaii, 226 U. S. 184, 57 L. ed. 180, lies in the difference in population and difference in value of the privilege. It appeared by the opinion that the great bulk of the business of the territory is done in Honolulu. We have many [fol. 208] similar statutes where the amount of license fees is based on population. See Revised General Statutes, § 809, Automobile agencies; § 822, auctioneers; § 823, abstractors of title; § 860, laundries; § 887, electric light plants; § 891, florists; § 900, gas plants; § 972, shows. But in all such cases the license fee is regulated by the population of the place where the business is conducted, and there is no provision for increasing the fee to be paid in one place simply by reason of the fact that the owner operates a similar business in other places or in other counties. The scheme provided by the sub-sections of sec. V of the Act in question for increasing the license fee, first depending upon the number of places in a single county, and second, the number of places in different counties, is an entirely new scheme of taxation in Florida, and wholly unlike that involved in the Hawaii case.

As to the Alaska canned fish case, there is a further distinction in that Congress, through its delegated agency, the territorial legislature had power to use the license tax not only to raise revenue, but to restrict the industry and thereby conserve a natural resource. The opinion says:

"To prevent the territory from doing away with all protection in a short sighted rush for fish."

It thus appears that the statute was designed primarily for the protection of game and fish. Such cases fall in a class by themselves, as lately recognized in the majority opinion of the Supreme Court delivered in New State Ice Company v. Liebmann, 76 L. ed. (Adv. text 484, second [fol. 209] column.) Such a basis of classification has no application to any of the appellants.

In like manner appellants respectfully seek leave to distinguish other cases relied upon to support the majority opinion.

IV

The Court overlooked the point made by the sworn bill of complaint and sworn petitions of intervention, that sub-sections 1, 3, 5, 7, 9 and 11, of section V of the Act in question, in undertaking to discriminate in favor of the local merchants of any particular County as against all non-residents thereof, operate to discriminate against citizens of other States, such as many of the appellants; all of which is in derogation of art. 4, § 2 of the Federal Constitution, as illustrated by the cases quoted pages 223, 224 and 231 of printed brief for appellants filed in this cause, and as further illustrated by

Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 79, 64 L. ed. 460, 469.

V

Appellants respectfully suggest that equality of treatment under the equal protection of the laws clause of the 14th Amendment, and section 1 of the Florida Declaration of Rights should be the test for determining the validity of sub-sections 1, 3, 5, 7, 9 and 11, of section V of the Act in question, rather than arbitrariness to the extent of op- [fol. 210] pression and confiscation, as asserted by the majority opinion, top page 17 thereof.

VI

The following pronouncement of the majority opinion:

"Owners of chain stores are classified on two bases and all in each class are treated alike. If located in different counties the necessary implication of larger volume, wider circulation, growing profits, business expansion and larger

opportunity under group control must follow. These facts are ample to support that classification."

seems to have overlooked or to have disregarded the specific facts and ultimate facts set forth in appellants' sworn bill and sworn petitions of intervention, thereby depriving appellants of their rights and properties without due process of law, and without equal protection of the laws, contrary to the 14th Amendment, as more specifically set forth in section I of this petition.

VII

The majority opinion bottom of page 20 says:

"We know of no reason nor do appellants cite any for relieving superior skill, initiative, and industry from the payment of a tax."

[fol. 211] The appellants respectfully say that they have made no contention to the effect that superior skill, initiative and industry should escape and mediocrity be taxed. On the contrary, appellants have contended that in fixing the amounts of license taxes, no member of the same class should have a law made advantage over another, in order to exercise the inalienable right of engaging in any of the common occupations of life; and appellants submit that the case of

New State Ice Company v. Liebmann, 76 L. ed. (Adv. 479),

quoted in section II of this petition, sustains that view. It required the Sixteenth Amendment to authorize the Federal Government to levy an income tax. Many States such as North Carolina levy income taxes, whereas art. 9, § 11 of the Florida Constitution prohibits any income tax in this State. That prohibition, coupled with the requirement of equal civil rights, contained in § 1 of the Florida Declaration of Rights, entitles every merchant to the same treatment without regard to skill, initiative or other personal qualifications; otherwise the skillful surgeon who perhaps makes $1,000.00 a day should pay several hundred times as much license fee to practice his profession as a doctor of mediocre ability.

VIII

The extracts quoted from the majority opinion in sections I, VI and VII of this petition, and other related parts of said opinion show, as appellants respectfully sug- [fol. 212] gest, that the Court overlooked a further point made by appellants' sworn bill and sworn petitions of intervention that the so-called differences and supposed advantages, if they exist, are enjoyed, if enjoyed at all, by appellants beyond the State of Florida, and, therefore, may not be seized upon as a basis of classification and discrimination for the imposition of high license fees to do business within the State of Florida. See pages 147 to 157 of printed brief for appellants. If the State of Florida can impose a high license tax for a privilege enjoyed elsewhere, every other State may do likewise, thereby accomplishing the complete destruction of those appellants who do business in many States, as shown by this record.

IX

As to the discrimination in favor of filling stations engaged exclusively in the sale of gasoline and other petroleum products, the majority opinion seems to have overlooked the discrimination among filling stations themselves, pointed out in the printed brief for appellants, pages 241 to 255, and the consequence thereof, as further pointed out in the same brief, page 255.

X

The majority opinion finds that the contention of appellants as to discriminatory administration of the Act, as complained in § XV. of the bill (R. 76 to 81) is without merit. The concurring opinion of Mr. Justice Davis, dealing with the same subject, says:

[fol. 213] "Appellants argue that the Comptroller's administration of the act is arbitrary and unreasonable * * * Assuming, but not deciding that all these complaints are true, and that the Act is in fact being so unjusti-ably enforced as to deny to appellants the equal protection of the laws by reason of its administration, appellants have a plain, complete and adequate remedy at law to coerce the non discriminatory administration of the Act by mandamus

against the tax officers to compel them to apply the provisions of the statute to all who are legally subject thereto. * * * Two wrongs do not make a right. Neither does the fact that tax officers commit a wrong in favor of one, entitle another to the privilege of that same wrong in his favor.

All citizens and taxpayers are entitled to a fair, impartial, just and equal administration of the revenue laws, which right, as this Court has pointed out, may be enforced by mandamus against officials who would try to do otherwise. The remedy for unequal administration is therefore not by injunction to cripple enforcement, but by mandamus to strengthen it."

These pronouncements, as it appears to appellants, are in direct conflict with recent decisions of the Supreme Court of the United States, and as well with prior decisions of this Court.

In the case of

[fol. 214] Iowa-Des Moines Nat. Bank v. Bennett, 52 S. Ct. 137, 76 L. Ed. (Adv. 164), decided December 4, 1931,

the last paragraph of the opinion said:

"The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. Cumberland Coal Co. v. Board of Revision, — U. S. —, ante 131, 52 S. Ct. 48; Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 514-518, 61 L. Ed. 1280, 1288-1290, 37 S. Ct. 673, Ann. Cas. 1917E 88; Chicago G. W. R. Co. v. Kendall, 266 U. S. 94, 98, 69 L. ed. 183, 188, 45 S. Ct. 55; Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 67 L. Ed. 340, 28 A. L. R. 979, 43 S. Ct. 190. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. Montana Nat. Bank v. Yellowstone County, 267 U. S. 499, 72 L. Ed. 673, 48 S. Ct. 331."

Some of the cases cited in this text, notably the Greene case, (see last paragraph thereof) were cited and followed by this Court in the case of

[fol. 215] L. & N. R. Co. v. Amos, 98 Fla. 350, 123 So. 745.

See also:

Cooey v. Johnson, 95 Fla. 946, 117 So. 111;

Folsom v. Bank of Greenwood, 97 Fla. 426, 120 So. 317;

Roberts v. American Natl. Bank of Pensacola, 97 Fla. 411, 121 So. 554.

On account of the aforesaid matters severally, these appellants now respectfully submit that the majority opinions rendered in said cause, and the decree of the Court of April 4, 1932, are erroneous.

Wherefore appellants pray that a rehearing in said cause be granted, and that the decree of the court below be reversed.

Respectfully submitted.

Kay, Adams, Ragland & Kurz, by Thos. B. Adams, Attorneys for Appellants.

[fols. 216 & 217] In Supreme Court of Florida, January Term, A. D. 1932

[Title omitted]

Order Denying Rehearing—May 19, 1932

A petition for rehearing having been filed in this cause and same having been duly considered it is ordered by the Court that the said petition be and the same is hereby denied.

[fol. 218] IN SUPREME COURT OF FLORIDA

LOUIS K. LIGGETT COMPANY, a Corporation; WINN & LOVETT Grocery Company, a Corporation; Paxson's, Inc., a Corporation; The Nunnally Company, a Corporation; Mellville Shoe Corporation, a Corporation; G. R. Kinney Shoe Company, a Corporation; J. C. Penney Company, a Corporation; F. W. Woolworth Company, a Corporation; Montgomery Ward & Company, a Corporation; The Great Atlantic & Pacific Tea Company, a Corporation; United Cigar Stores Company, a Corporation; Southern Stores Corporation, a Corporation, and South Florida Stores Corporation, a Corporation, Appellants,

vs.

ERNEST AMOS, as Comptroller of the State of Florida; R. B. Council, as Tax Collector of Leon County, Florida, and R. F. Bowden, as Tax Collector of Duval County, Florida, Appellees.

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA TO THE SUPREME COURT OF THE UNITED STATES —Filed July 26, 1932

To Honorable Rivers Buford, Chief Justice of the Supreme Court of Florida, and/or to the Supreme Court of Florida:

Louis K. Liggett Company, a Corporation, and the several appellants named in the above styled cause, your petitioners, respectfully show:

[fol. 219] 1. That Louis K. Liggett Company, a Corporation, and each of the parties named as appellants in the foregoing cause, are new appellants seeking a review by the Supreme Court of the United States of the orders and judgments of the Supreme Court of Florida rendered in said cause.

2. That on November 12, 1931, your petitioners Louis K. Liggett Company, a Corporation, Winn & Lovett Grocery Company, a Corporation, and Paxson's Inc. a Corporation, filed their amended bill in the Circuit Court in and for Leon County, Florida, against the above named appellees, Ernest

Amos as Comptroller of the State of Florida, R. B. Council as Tax Collector of Leon County Florida, and R. F. Bowden as Tax Collector of Duval County, Florida, seeking to have Chapter 15624 Laws of Florida, 1931, and the several sections thereof adjudged invalid, and to procure an injunction restraining said appellees from enforcing the provisions of said Act, attempting to provide for the payment of certain license and excise taxes for doing business within the State of Florida. That on the same day your Petitioner, The Nunnally Company, filed in said Circuit Court its petition of intervention, adopting the averments of said amended bill, and seeking the same relief as sought by the complainants named in said bill. That on the same day your petitioners Mellville Shoe Corporation, G. R. Kinney Shoe Company, J. C. Penney Company, F. W. Woolworth Company, Montgomery Ward & Company, The Great Atlantic & Pacific Tea Company, United Cigar Stores Company, Southern Stores Corporation and South Florida Stores Corporation, severally filed their petitions of intervention in said Circuit, adopting the provisions and averments of said amended bill of complaint, and seeking the same relief against the enforcement of said statute. That [fol. 220] all of said petitions of intervention were duly allowed by said Circuit Court. That on the 15th day of December, 1931, the Judge of said Circuit Court denied the temporary restraining order prayed for by said appellants, and granted the motion of said appellees to dismiss said amended bill, and thereupon dismissed said amended bill at the costs of said appellants.

3. That an appeal was duly taken from the decree of said Circuit Court to the said Supreme Court of Florida, and on the 4th day of April, A. D. 1932, said Supreme Court of Florida rendered its opinion, judgment and decree affirming the said decree of said Circuit Court. That thereafter your petitioners duly filed in said Supreme Court their Petition for Rehearing, which said petition was denied by the Supreme Court of Florida on the 19th day of May, A. D. 1932.

4. That in said cause there is drawn in question the validity of said Chapter 15624 Laws of Florida, 1931, on the ground of its being repugnant to the Constitution of

the United States, and the decision and judgment of said Supreme Court of Florida is in favor of its validity within the purview of 28 U. S. C. A., § 344-a, in that:

(a) The several subsections 1, 2, 4, 6, 8 and 10 of section 5 of said Act, as applied to the factual situation set forth in said amended bill, and admitted by the motion to dismiss, created arbitrary and unreasonable discriminations between single store retail merchants and chain store retail merchants doing business in the same County, contrary to the due process clause and equal protection of the laws clause of the 14th Amendment to the Constitution of the United States.

[fol. 221] (b) The several sub-sections 1 to 11, inclusive, of section 5 of said Act, as applied to the factual situation set up in the amended bill, admitted by the motion to dismiss, created arbitrary and unreasonable discriminations between retail merchants doing business in only one County, and merchants, such as appellants severally, doing business in different Counties of the State of Florida, contrary to the due process clause and the equal protection of the laws clause of the 14th Amendment to the Federal Constitution.

(c) That sec. 11 of said Act, undertaking to provide for County and municipal license taxes for retail merchants affected by said Act, is predicated upon and graduated by the arbitrary State license fees created by sec. 5 of said Act, and is therefore void for the same reasons pointed out with respect to sec. 5 of said Act.

(d) That the provisions of sec. 8, the last clause of sec. 5, and sec. 2 of said Act, exempting wholesale merchants, who remain subject to the license tax provided for by § 1197 Compiled General Laws of Florida, as applied to the factual situation set up on the amended bill, create arbitrary and unreasonable discriminations against all chain or multiple retail merchants who own and operate warehouses within the State of Florida, contrary to the due process clause and equal protection of the laws clause of the 14th Amendment to the Federal Constitution.

[fol. 222] (e) That the proviso contained in sec. 8 of said Act, undertaking to exempt filling stations engaged exclusively in the sale of gasoline and other petroleum prod-

uets, as applied to the factual situation set up in the amended bill, admitted by the motion to dismiss, creates an arbitrary and unreasonable discrimination and classification against all other owners of retail stores as defined in said Act, contrary to said clauses of said 14th Amendment.

(f) That secs. 5 and 11 of said Act undertake to utilize the interstate characteristics and incidents of operating many retail stores in Florida, in connection with the operation of similar retail stores in other States, as a basis for the discriminatory, arbitrary and unreasonable license taxes imposed upon appellants who are such operators, not imposed upon single store merchants, whose businesses do not have such characteristics, and thereby the interstate commerce and business so conducted outside of Florida by appellants is arbitrarily and unreasonably burdened and taxed contrary to the commerce clause, art. 1, sec. 8, of the Federal Constitution and contrary to the due process clause of said 14th Amendment.

That the invalidity of said parts of said Act renders the whole Act invalid as in violation of the due process clause and equal protection of the laws clause of said 14th amendment.

5. That in and by said amended bill and said petitions of intervention so filed in said Circuit Court, a title, right, privilege and immunity was specially set up and claimed by said appellants severally under the Constitution of the United States, within the purview of 28 U. S. C. A., sec. 344-b, in that in section 15 of said amended bill, adopted [fol. 223] by said intervenors, complaint was made that the appellee, Ernest Amos, as Comptroller of the State of Florida, had attempted to administer said Act so as to exempt furniture dealers, filling stations that sell tires and tubes, automobile dealers, cigar stores, restaurants, and sundry other classes of store operators, whether single store operators or chain store operators, and that by so administering said Act the said Comptroller was undertaking to create arbitrary and unreasonable discriminations and classification between appellants and other such store operators, contrary to the due process clause and equal protection of the laws clause of said 14th Amendment.

6. Your Petitioners would further show that a title, right, privilege and immunity was specially set up and claimed by said appellants severally under the due process clause of the 14th Amendment to the Federal Constitution, within the purview of 28 U. S. C. A., § 344-b, in that by the petition for rehearing in said cause they severally complained that the Supreme Court of Florida predicated its opinion and decree of affirmance largely upon an alleged factual situation claimed to be judicially noticed, contrary to the factual situation sworn to and set up in said amended bill and said petitions of intervention, and admitted by the motion to dismiss, and by so doing appellants severally were deprived of an opportunity to be heard on the facts, contrary to the due process clause of the 14th Amendment.

7. That all and singular the grounds of invalidity, and all and singular the titles, rights, privileges and immuni-[fol. 224] ties claimed as aforesaid, were overruled and denied by the Supreme Court of Florida, and the said statute and all the parts thereof, and all the acts of said Comptroller thereunder were in all respects sustained and held to be valid, anything in said amended bill or in said petitions of intervention to the contrary notwithstanding.

8. That the Supreme Court of Florida is the highest Court of the State of Florida to which said cause may be taken, and its judgment and decree affirming said order and decree of said Circuit Court, and the further order of said Supreme Court of Florida denying said petition for rehearing in said cause, are final.

9. That in said decree of said Circuit Court, and in the petition, judgment, decree and orders of said Supreme Court of Florida, certain errors were committed to the prejudice of your Petitioners severally, all of which will more in detail appear from the assignment of errors which is filed with this petition.

10. That on account of the proceedings aforesaid, had in said Circuit Court and in the Supreme Court of Florida, none of said appellants have paid the license taxes, fees and charges prescribed by said Chapter 15624, Laws of Florida, 1931, and appellants severally desire that pending their further appeal to the Supreme Court of the United States, a stay order may be granted, authorizing appellants

either to file within a definite period to be fixed by the Court, a bond sufficient to secure the payment of taxes which should have been paid by them severally, if said appeal is lost in the Supreme Court of the United States; or providing that appellants severally may pay into the hands of the Comptroller the amount of license taxes, fees, [fol. 225] etc. assessable under said Act, for the year beginning October 1, 1931, within the time to be fixed by the order upon this petition, and that in either such case the Appellees in this cause, and all those acting under their direction, may be required to stay the enforcement of said Act as to appellants severally pending the outcome of said appeal. And petitioners respectfully suggest that in as much as the amount of such license taxes and fees chargeable to them severally under said Act vary so greatly between a business such as Paxson's, Inc., operating only seven small shoe stores, and a business such as The Great Atlantic and Pacific Tea Company, operating 226 stores within the State, that it would be more practicable to use the latter alternative above suggested, that is to authorize the appellants severally to pay into the hands of the Comptroller the license taxes and fees chargeable to them severally, within a time to be fixed by the Court, and that upon so doing the appellees in said cause, and those acting under their direction, shall stay the enforcement of said Act as regards those appellants who shall comply with such order, pending the outcome of said appeal; and if, as a result of said appeal, said Act is held to be invalid, and the orders and decrees of said Supreme Court of Florida reversed, then the moneys so paid to the Comptroller shall be returned to the appellants depositing the same severally; otherwise said Comptroller shall retain the same as payment of the license taxes and fees chargeable and collectable under said Act.

That the order allowing appeal shall also fix the amount of cost bond, to be executed by one or more of the appellants.

[fol. 226] Wherefore Petitioners severally pray for the allowance of an appeal from said Supreme Court of Florida to the Supreme Court of the United States, in order that the decision, judgment, decree and orders of said Supreme Court of Florida may be examined and reversed.

And Petitioners also pray that a transcript of the record, proceedings and papers in said cause, duly authenticated by the Clerk of said Supreme Court of Florida, may be sent to the Supreme Court of the United States as provided by law.

This 26th day of July, A. D., 1932.

Thos. B. Allan, Roy M. Sterne, Attorneys for Petitioners and Proposed Appellants.

[fols. 227-233] And thereafter, to-wit, on the 26th day of July, A. D. 1932, the aforesaid Appellants filed in the Supreme Court of Florida their assignment of error on appeal from the Supreme Court of Florida to the Supreme Court of the United States which assignment of errors are in words and figures as follows, to-wit:

[Assignments of error omitted in printing.]

[fol. 234] IN SUPREME COURT OF FLORIDA

[Title omitted]

ORDER ALLOWING APPEAL FROM THE SUPREME COURT OF FLORIDA TO THE SUPREME COURT OF THE UNITED STATES—Filed July 26, 1932

The petition of Louis K. Liggett Company, a Corporation, et al., for an appeal in the above styled cause to the Supreme Court of the United States, from the Supreme Court of Florida, and the assignment of error filed therewith, and the record in said cause, having been considered, it is thereupon considered, ordered, and adjudged as follows:

1. That an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of Florida, as prayed for in and by said Petition, and the Clerk of the Supreme Court of the State of Florida shall prepare and certify a transcript of the record and proceedings in the above cause, and forward the same to the

Supreme Court of the United States, within twenty (20) days from the date hereof.

2. It is further ordered that the said Louis K. Liggett Company, or some one of the appellants named in said petition for allowance of appeal, shall give good and sufficient security in the sum of One Thousand dollars, that said [fol. 235] appellants shall prosecute said appeal to effect, and if said appellants fail to make good their plea, such obligor appellant shall answer all costs by reason of said appeal; and one of said appellants, Winn & Lovett Grocery Company, now presenting a bond in the sum of One Thousand dollars, with Indemnity Insurance Company of North America, as Surety, it is further ordered that said bond be and the same is hereby approved as a cost bond in said cause.

3. And it further being made to appear to the Court that none of said appellants have paid the license taxes and fees required by Chapter 15624 for the current year beginning October 1, 1931, but that they were desirous of paying the amounts chargeable under said Act into the hands of the Comptroller, same to be retained by him in a special fund pending the outcome of said appeal, and to be retained by him as a payment of said taxes, fees, etc. if the judgment of said Supreme Court of Florida be affirmed, or if said appellants fail to prosecute their appeal to effect; OR if said appeal be sustained and said Act declared invalid the payments so made shall be returned to them severally; and the Court being fully advised in the premises, it is further ordered that said appellants be and they are hereby severally allowed to pay unto Ernest Amos, as Comptroller of the State of Florida, within thirty days from the date hereof, such amount as is chargeable to them severally for license taxes and fees, without the addition of penalties, as is provided by Chap. 15624, Laws of Florida, 1931; and upon making payment as aforesaid, within the time aforesaid, this appeal shall, as to such of the appellants as may make such payments, operate as a stay of the enforcement of said Act by the said Ernest Amos, Comptroller, and his successor in office, and those acting under his authority or direction, pending the determination of said appeal by the [fols. 236 & 237] Supreme Court of the United States; during which time said Comptroller and/or his successor in

office shall retain the monies so paid by the appellants severally in a separate fund, subject to the outcome of said appeal, and in the event said appeal shall result in an affirmance of the decision and judgment of the Supreme Court of Florida in said cause, the payments so made by appellants shall operate as payment of the license taxes and fees chargeable under said Act. That in the event said appeal results in the reversal of the judgment of the Supreme Court of Florida, and an adjudication that said Act is void and unenforceable, then the amounts so paid by the appellants severally shall be returned to them severally by the said Comptroller, or his successor in office, less amounts payable under the prior law.

Done and ordered this 26th day of July, A. D. 1932.

Rivers Buford, Chief Justice of the Supreme Court of Florida.

[fols. 238 & 239] Citation, in usual form, showing service on Cary D. Landis, filed July 26, 1932, omitted in printing.

[fols. 240-247] And thereafter, to-wit, on the 26th day of July, A. D. 1932, the Appellants aforesaid filed in the Supreme Court of Florida their cost bond on the appeal herein from the Supreme Court of Florida to the Supreme Court of the United States which cost bond with its approval by the Chief Justice of the Supreme Court of Florida is in words and figures as follows, to-wit:

Bond omitted in printing.

[fol. 248] IN SUPREME COURT OF FLORIDA

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed July 26, 1932

To Honorable G. T. Whitfield, Clerk Supreme Court of Florida:

In preparing the transcript of record for appeal in said cause from the Supreme Court of Florida to the Supreme Court of the United States, you will please include the following:

1. Copy the transcript of record in said cause in full as it came from the Circuit Court in and for Leon County, Florida, to the Supreme Court of Florida.

2. Copy the opinion of the Court (majority opinion) and the dissenting opinion of Justice Brown and Justice Ellis, rendered April 4, 1932, now reported 141 So. 153 to 171.

3. Copy the judgment and/or decree of affirmance entered April 4, 1932.

3. Copy amended Petition for Rehearing, showing filing date.

4. Copy order of the Court dated May 19, 1932, denying petition for rehearing.

[fol. 249] 5. Copy Petition for Appeal, showing filing date.

6. Copy Assignment of Errors, showing filing date.

7. Copy Order allowing Appeal showing filing date.

8. Copy Citation showing filing date, and acknowledgment of service upon counsel for Appellees.

9. Copy Cost Bond and Approval thereof.

10. Copy this Præcipe for Transcript.

11. Add your Certificate.

Thos. B. Adams, Roy M. Sterne, of Counsel for Appellants.

Copy of the foregoing præcipe received and further directions waived this July 26th, 1932.

Cary D. Landis, of Counsel for Appellees named in the foregoing case.

[fols. 250 & 251] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 252] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 13, 1932

Come now Louis K. Liggett Company, a Corporation, and the several appellants named in the appeal filed in the

above styled cause (R. 218 to 226) and severally adopt the Amended Assignments of Error filed August 10, 1932 as of July 26, 1932, as their statements of the points to be relied upon.

Appellants severally further state that in printing the record recital of filing only may be shown as to the following papers:

Title of paper	Record page
Original Bill of Complaint	1
Petition of Intervention by Paxson's Inc.	1
Motion to Dismiss Original Bill of Complaint	1
Order allowing Intervention by Paxson's Inc.	1
Order dismissing Original Bill	1
[fol. 253] Petition for Rehearing	3
Order granting Rehearing	10
Notice of Application for leave to file Amended Bill and for Temporary Restraining Order	11
Objections to filing Amended Bill	14
Stipulation of Counsel for preparation of Transcript in State Supreme Court	151
Assignments of Error filed July 26th, 1932	228 & 232
Certificate of Clerk of Circuit Court of Leon County, Florida	155
Cost Bond	240 to 246

That the following parts of the record as certified by the Clerk of the Supreme Court of Florida, and filed in this Court, are deemed necessary to be printed for the consideration of the points above set forth, i. e.:

Title of paper	Record page
Amended Bill of Complaint with all Exhibits therein referred to and made a part thereof, Nos. 1 to 7, inclusive, except exhibit No. 4, being certain pages from a newspaper hereinafter referred to	16 to 104
Motion to Dismiss Bill of Complaint	104
Affidavit of G. D. Wood	107
Exhibit 1 to affidavit of G. D. Wood	109
Order allowing Intervention of Southern Stores Corporation, et al.	115
Petition of Intervention of The Nunnally Company	116

Title of paper	Record page
Exhibit No. 1 to Petition of Intervention of The Nunnally Company	123
Petition of Intervention of Mellville Shoe Corporation, et al.	124
Petition of Invention of Southern Stores Corporation, et al.	137
Final Decree	143
Notice and Entry of Appeal to Supreme Court of Florida	145
[fol. 254] Assignments of Error to the Supreme Court of Florida	148
Submission to the Supreme Court of Florida January 7, 1932	156
Majority Opinion and Dissenting Opinion of the Supreme Court of Florida	157 to 197
Judgment and Decree of the Supreme Court of Florida affirming the lower Court	198 to 199
Amended Petition for Rehearing	201
Petition for Appeal to the Supreme Court of the United States	218 to 226
Amended Assignments of Error to the Supreme Court of the United States filed on August 10, 1932 as of July 26th, 1932, together with stipulation of counsel	234 to 236
Citation	238 to 239
Præcipe for Transcript by the Clerk of the Supreme Court of Florida	248 to 249
Certificate of Clerk of the Supreme Court of Florida	251

That Exhibit #4 to said amended bill of complaint may be supplied in lieu of printing the same to the extent of thirty copies furnished by counsel for appellants, the same to be utilized as far as they will go in the preparation of the requisite number of printed copies of the record.

That those parts of the record transmitted, but not to be printed, may be preserved for use by the Court or counsel as shall be deemed necessary.

Dated this August 10th, A. D., 1932.

Thos. B. Adams, Roy M. Stern, Counsel for Appellants.

[fol. 255] Copy of the foregoing designation of points to be relied upon and parts of record to be printed received, and the printing of the record as therein requested is hereby consented to this 10th day of August, A. D. 1932.

H. E. Carter, of Counsel for Appellees.

[fol. 256] In Supreme Court of Florida

[Title omitted]

Amended Assignments of Error on Appeal from the Supreme Court of Florida to the Supreme Court of the United States

The said Louis K. Liggett Company, and each of the other Appellants named in the petition for appeal filed in said cause, severally assign the following errors in the record and proceedings in said cause:

1. The Supreme Court of Florida erred by its decision, judgment and decree of April 4, 1932 (opinion reported 141 Southern 153-171) in affirming the decree of the Circuit Court in and for Leon County, Florida rendered in said cause, denying injunction and dismissing Appellants' bill, notwithstanding the invalidity of Chapter 15624 Laws of Florida, 1931, complained of in said bill as being contrary to the due process clause and equal protection of the laws clause of the Fourteenth Amendment to the Federal Constitution.

2. The Supreme Court of Florida erred by its decision, judgment and decree of April 4, 1932 in sustaining the validity of sub-sections 1, 2, 4, 6, 8 and 10 of Section 5 of Chapter 15624 Laws of Florida, 1931, notwithstanding [fol. 257] the averments of the amended bill in said cause, admitted by the motion to dismiss, pointed out that said sections of said Act create arbitrary and unreasonable discriminations between single store retail merchants and chain store or multiple retail store merchants doing business in the same county, contrary to the due process clause and the equal protection of the laws clause of said Fourteenth Amendment.

3. The Supreme Court of Florida erred by its decision, judgment and decree of April 4, 1932, in sustaining the

validity of sub-sections 1 to 11 inclusive, of section 5 of said Act, as applied to the factual situation set up in said amended bill, admitted by the motion to dismiss, notwithstanding said amended bill pointed out that said sub-sections of said Act created arbitrary and unreasonable discrimination between retail merchants doing business in only one county, whether single store merchants or chain store merchants, and retail merchants such as the Appellants severally, doing business in different counties of the State of Florida, contrary to the due process clause and the equal protection of the laws clause of said Fourteenth Amendment.

4. Said Supreme Court of Florida erred by its said decision, judgment and decree in sustaining the validity of Section 11 of said Act, notwithstanding the amended bill and petitions of intervention in said cause severally pointed out that said section created the same arbitrary and unreasonable classifications and discriminations with respect to county and municipal license taxes as were created by Section 5 of said Act in regard to state and county license taxes and fees, all contrary to the due process clause and the equal protection of the laws clause of said Fourteenth Amendment.

[fol. 258] 5. The Supreme Court of Florida erred by its said decision, judgment and decree of April 4, 1932, in sustaining the validity of the provision of Section 8 and of the last clause of Section 5, and of Section 2 of said Act exempting wholesale merchants who remain subject to the license tax provided by Section 1197 Compiled General Laws from the arbitrary and unreasonable discriminations contained in said Chapter 15624, although warehouses owned and operated by multiple retail store merchants in connection with their said businesses stand in the same relation to the retail units of such owners as the wholesale merchant stands to single retail store merchants, all contrary to the due process clause and the equal protection of the laws clause of said Fourteenth Amendment.

6. The Supreme Court of Florida erred by its said decision, judgment and decree of April 4, 1932, in sustaining the validity of the proviso contained in Section 8 of said Chapter 15624, undertaking to exempt filling stations engaged exclusively in the sale of gasoline and other petro-

leum products, notwithstanding the factual situation presented by said amended bill and said petitions of intervention severally, pointing out that said proviso creates an arbitrary and unreasonable classification and discrimination against all other owners of retail stores as defined by said Chapter 15624, contrary to the due process clause and the equal protection of the laws clause of said Fourteenth Amendment.

7. The Supreme Court of Florida erred by its said decision, judgment and decree of April 4, 1932, in sustaining [fol. 259] the validity of Sections 5 and 11 of said Act, undertaking to seize upon and utilize the interstate characteristics and incidents of Appellants' operation of many retail stores in Florida in connection with similar retail stores in other states as a basis for the discriminating, arbitrary and unreasonable classifications and license taxes and fees imposed upon Appellants severally but not imposed upon single store merchants whose businesses do not have such characteristics, thereby arbitrarily and unduly burdening and discriminating against the Appellants severally and their said businesses by virtue of such interstate characteristics, contrary to the commerce clause of Section 8, Article 1 of the Federal Constitution, and contrary to the due process clause of the Fourteenth Amendment to said Constitution.

8. The Supreme Court of Florida erred by its decision, judgment and decree of April 4, 1932 in sustaining the validity of the acts of said Comptroller of the State of Florida in his arbitrary and discriminatory administration of said Chapter 15624 Laws of Florida, 1931, by exempting from the license taxes and fees provided for thereby, furniture dealers, filling stations that sell tires and tubes, automobile dealers, cigar stores, restaurants and sundry other classes of store operators, regardless of whether single store operators or chain store operators, thereby depriving Appellants severally of due process of law and of equal protection of the laws, contrary to the Fourteenth Amendment to the Federal Constitution.

9. The Supreme Court of Florida, by its decision and/or judgment and decree of April 4, 1932 erred in predicating its said decision (majority opinion 141 So. 153, et seq.) upon a factual situation held to exist by reason of the Court's

[fol. 260] judicial knowledge contrary to the factual situation set up in Appellants' sworn bill and sworn petitions of intervention, which latter factual situation was admitted by the motion to dismiss filed by the Appellees, and thereby the said Supreme Court of Florida deprived the Appellants severally of an opportunity to be heard as to the true factual situation, contrary to the due process clause of the Fourteenth Amendment to the Federal Constitution, and the error of the said Supreme Court of Florida in that behalf was repeated and confirmed by the subsequent order denying Appellants' petition for a rehearing in which this specific matter was then called to the attention of said Supreme Court of Florida.

10. The Supreme Court of Florida erred in not holding the provisions of the Act of the Legislature of the State of Florida, entitled "An Act Requiring Licenses for the Operation, Maintenance, Opening or Establishment of Stores in this State; prescribing the License and Fees to be Paid Therefor, and the Disposition Thereof, and the Powers and Duties of the Comptroller of the State of Florida and the Tax Collectors of the Several Counties of the State in Connection Therewith, and Prescribing Penalties for the Violation Thereof," being Chapter 15624 of the Laws of Florida, 1931, to be unconstitutional and void because violative of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

11. The Supreme Court of Florida erred in not holding the provisions of the said Act of the Legislature of the State of Florida, entitled as aforesaid, being Chapter 15624 of the Laws of Florida, 1931, to be unconstitutional because violative of the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 261] 12. The Supreme Court of Florida erred in not holding the provisions of the said Act of the Legislature of the State of Florida, entitled as aforesaid, being Chapter 15624 of the Laws of Florida, 1931, discriminating in the rates of license fees by reason of the number of stores located in any one county to be unconstitutional and void because violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

13. The Supreme Court of Florida erred in not holding the provisions of the said Act of the Legislature of the State of Florida, entitled as aforesaid, being Chapter 15624 of the Laws of Florida, 1931, discriminating in the rates of license fees by reason of the number of stores located in any one county to be unconstitutional and void because violative of the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.

14. The Supreme Court of Florida erred in not holding the provisions of the said Act of the Legislature of the State of Florida, entitled as aforesaid, being Chapter 15624 of the Laws of Florida, 1931, making the amount of license fees dependent upon the number of stores located in the same county or in different counties, to be unconstitutional and void because violative of the due process of the law clause of the Fourteenth Amendment to the Constitution of the United States.

15. The Supreme Court of Florida erred in not holding the provisions of the said Act of the Legislature of the State of Florida, entitled as aforesaid, being Chapter 15624 of the Laws of Florida, 1931, making the amount of license fees dependent upon the number of stores located in the same county or in different counties, to be unconstitutional [fol. 262] and void because violative of the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.

16. The Supreme Court of Florida erred in refusing to allow the Appellants severally to show by their evidence that the Act of the Legislature of the State of Florida, entitled as aforesaid, being Chapter 15624 of the Laws of Florida, 1931, is arbitrary, unreasonable and discriminatory in its operation upon Appellants severally, and therefore unconstitutional and void because violative of the due process of law clause and the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.

For which errors Louis K. Liggett Company and each of the other Appellants named in the petition for appeal filed in this cause severally pray that the said decision, judgment and decree of the Supreme Court of Florida, dated April

4, 1932, and the subsequent order of May 19, 1932 denying petition for rehearing, be reversed and a judgment rendered in favor of the said Appellants.

Thos. B. Adams, Roy M. Stern, Counsel for Appellants.

It is hereby stipulated between counsel that the foregoing Amended Assignments of Error may now be filed in said cause as of July 26, A. D. 1932, in lieu of the original Assignments of Error filed in said cause on the 26th day of July, 1932, and that a duly certified copy of the foregoing [fol. 263] Amended Assignments of Error may be forthwith transmitted to Washington and be printed in the record in lieu of the original Assignments of Error filed as aforesaid.

Dated this August 10, A. D. 1932.

Thos. B. Adams, of Counsel for Appellants. H. E. Carter, of Counsel for Appellees.

[fol. 264] In the Supreme Court of Florida

I, G. T. Whitfield, Clerk of the Supreme Court of Florida, do hereby certify that the foregoing pages, numbered 1 to 8, inclusive, contain a true, full and correct copy of Amended Assignment of Errors on appeal from the Supreme Court of Florida to the Supreme Court of the United States, filed in the Supreme Court of Florida on the 10th day of August, A. D. 1932, as of July 26th, 1932, as the same appears on file in my said office.

Witness my hand and the Seal of the Supreme Court of Florida at Tallahassee, Florida, this 10th day of August, A. D. 1932.

G. T. Whitfield, Clerk Supreme Court of Florida.
(Seal Supreme Court of Florida.)

[fol. 265] File endorsement omitted.]

Endorsed on cover: File No. 36,998. Florida Supreme Court. Term No. 301. Louis K. Liggett Company et al., appellants, vs. Ernest Amos, as Comptroller of the State of Florida; R. B. Council, as Tax Collector of the State of Florida, et al., etc. Filed August 15, 1932. File No. 36,998.

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SUPREME COURT OF THE UNITED STATES

October Term, 1932.

No. 301

LOUIS K. LIGGETT COMPANY,
a Corporation, et al.,

Appellants,

vs.

ERNEST AMOS, as Comptroller of
the State of Florida, et al.,

Appellees.

On Appeal from the Supreme Court of Florida to the Supreme Court of the United States.

JURISDICTIONAL STATEMENT

ROY M. STERNE,
THOS. B. ADAMS,
Counsel for Appellants.

Floridian Press, Jacksonville, Fla.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1932.

No. 301

LOUIS K. LIGGETT COMPANY,
a Corporation, et al.,

Appellants,

vs.

ERNEST AMOS, as Comptroller of the State of Florida, et al.,

Appellees.

JURISDICTIONAL STATEMENT

Statement of Basis on which Appellants Contend That the Supreme Court of the United States Has Jurisdiction to Review on Appeal the Judgment and/or Decree of the Supreme Court of Florida, entered April 4, 1932, affirming the Decree of the Circuit Court in and for Leon County, Florida, Dismissing Appellants' Amended Bill of Complaint, on Motion to Dismiss filed by Appellees. (Rehearing Denied May 19, 1932).

I.

The federal statute believed and relied upon to sustain appellate jurisdiction in said cause is Sec. 344 (a) of Title 28 of the United States Code, which provides:

"A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question . . . the validity of a statute of any State, on the ground of it being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error." (Appeal). (Appeal having been substituted for writ of error under section 861 (a) of Title 28 of the United States Code).

II.

The judgment and decree of the Supreme Court of Florida appealed from was entered on the 4th day of April, A. D. 1932, as appears by the opinion of the Supreme Court of Florida (Typewritten Tr. pp. 157 to 197, reported as Louis K. Liggett Co. v. Amos, 141 So. 153 to 171), and as appears by the judgment and/or decree of the Supreme Court of Florida, affirming the lower Court (Tpn. Tr. pp. 198 to 199)—the time for appeal, however, being suspended by the timely filing of Petition for Rehearing, which was denied on May 19, 1932, as appears by Order of the Supreme Court of Florida, immediately following the amended Petition for Rehearing (Tpn. Tr. p. 217, the printed record not being available in time to prepare this statement).

III.

That the application or petition of appellants severally for appeal to the Supreme Court of the United States was presented to the Supreme Court of Florida on the 26th day of July, A. D. 1932, as appears by the typewritten transcript from the Supreme Court of Florida, pp. 218 to 226.

IV.

This was a suit in equity filed in the Circuit Court in and for Leon County, Florida, as a class suit, pursuant to sec. 14, Chap. 14658, Laws of Florida, 1931, reading as follows:

> "Section 14. **Class Suits: Effect Of.** When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

Said suit was filed to test the validity of and to enjoin the enforcement of Chap. 15624, Laws of Florida, 1931, imposing arbitrary, discriminatory and unreasonable license taxes upon appellants severally, for the privilege of conducting retail merchandise stores in the State of Florida, said statute prescribing arbitrarily different rates of taxation per store as between stores located in one county and stores located in different counties of the State of Florida. That in and by appellants' amended bill of complaint it was

and is averred that the said chapter 15624 is invalid as being repugnant to the Constitution of the United States, in that it denies to the appellants the due process of law and equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States, and repugnant to the Commerce Clause of Art. I, sec. 8 of said Constitution; that the decision of the question of whether said statute is invalid as repugnant to the Constitution of the United States was necessary to the determination of said cause, and the Supreme Court of Florida actually decided in favor of the validity of said statute. That the grounds and bases for attack upon said Florida Statute are more particularly set forth in the amended bill of complaint of the appellants Louis K. Liggett Company, a Corporation, Winn & Lovett Grocery Company, a Corporation, and Paxson's Inc. a Corporation (Tpn. Tr. from the Supreme Court of Florida pp. 16 to 103); and set forth in the Petition of Intervention by the appellant, The Nunnally Company, a Corporation (Tpn. Tr. from the Supreme Court of Florida, p. 116); and the Petition of Intervention by appellants Mellville Shoe Corporation, a Corporation, and others (Tpn. Tr. from the Supreme Court of Florida, p. 124) and the Petition of Intervention by appellants Southern Stores Corporation, a Corporation, and others (Tpn. Tr. from the Supreme Court of Florida, p. 137). That the Appellees made a motion to dismiss said bill (Tpn. Tr. from the Supreme Court of Florida, p. 104), and the Circuit Court in and for Leon County, Florida, in which said suit was instituted, entered its final decree holding said Chapter 15624 to be constitutional and valid under the Constitution of the United States, and sustaining the said motion to dismiss, and dismissing

said amended bill, which final decree was affirmed by the final decree of the Supreme Court of Florida entered April 4, 1932, now appealed from; (rehearing having been denied by said order of May 19, 1932). That no question was raised by Appellees as to the jurisdiction of said Circuit Court to grant the injunction prayed for, or as to the right of Appellants to the relief sought, if the said statute is invalid as repugnant to the Constitution of the United States, and the Circuit Court of Leon County, Florida, and the Supreme Court of Florida severally took jurisdiction of said suit and passed on the constitutionality of said statute, and denied relief on the ground that said statute is not invalid as repugnant to the Constitution of the United States, it being conceded by all parties, and the said Courts severally, that if said law is unconstitutional and invalid as repugnant to the Constitution of the United States, the Appellants are entitled to the relief prayed for. All question as to whether the proper remedy had been invoked was set at rest.

First Natl. Bank v. Anderson, 269 U. S. 341,
70 L. ed. 295, 2 h. n.

V.

That the following (among others) points of invalidity of said Chapter 15624, Laws of Florida, 1931, and its administration, were urged by said amended bill for injunction and petitions of intervention, and following each point we cite the authorities believed to sustain the jurisdiction of the Supreme Court of the United States to review the

judgment and/or decree of the Supreme Court of Florida, sustaining the validity of said State statute, and the alleged administration thereof, notwithstanding such asserted invalidity:

Point 1.

Said Amended Bill (Tpn. R. 30) urged that sub-sections 1, 2, 4, 6, 8 and 10, of Section 5 of said Act, as applied to the factual situation set forth in said Amended Bill, create arbitrary and unreasonable discriminations between single store retail merchants and chain or multiple store retail merchants doing business in the same County, contrary to the Due Process Clause, and the Equal Protection of the Laws Clause of the 14th Amendment to the Federal Constitution.

Louisville G. & E. Co. v. Coleman,
277 U. S. 32, 72 L. ed. 270;
Quaker City Cab Co. v. Pennsylvania,
277 U. S. 389, 72 L. ed. 927;
Airway Electric Corporation v. Day,
266 U. S. 71, 69 L. ed. 169;
Louis K. Liggett Co. v. Baldridge,
278 U. S. 105, 72 L. ed. 204;
Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264;
New State Ice Co. v. Liebmann,
52 S. Ct. 371, 76 L. ed. (Adv. 479).

Similar constitutional point was made in the Indiana Chain Store Case (283 U. S. 527), but the factual situation

of this case is materially and essentially different; such difference in the factual situation being definitely averred, specified and particularized in said amended bill of complaint.

Point 2.

Said Amended Bill (Tpn. R. 31-32) urged that the several sub-sections 1 to 11, inclusive, of sec. 5 of said Act, quoted in the opinions of the dissenting Justices of the Supreme Court of Florida (141 So. 161), as applied to the factual situation set up in the amended bill, create arbitrary and unreasonable discriminations between retail merchants doing business in only one County of Florida, whether single store merchants or chain store merchants, and retail store merchants, such as appellants severally, doing business in different Counties of the State of Florida, contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment to the Federal Constitution.

Louisville G. & E. Co. v. Coleman,
277 U. S. 32, 72 L. ed. 770;
Quaker City Cab Co. v. Pennsylvania,
277 U. S. 389, 72 L. ed. 927;
Chalker v. Birmingham, Etc. R. Co.,
249 U. S. 522, 63 L. ed. 748;
Bethlehem Motors Corp. v. Flynt,
256 U. S. 421, 65 L. ed. 1029;
Jay Burns Baking Co. v. Bryan,
264 U. S. 504, 68 L. ed. 813;
New State Ice Company v. Liebmann,
52 S. Ct. 371, 76 L. ed. (Adv. 479).

No such discrimination, based on county lines only, was involved in either the Indiana case (283 U. S. 527), or the North Carolina Case (52 S. Ct. 26).

Point 3.

Said Amended Bill (Tpn. R. 32-33) urged that Section 11 of said Act, undertaking to prescribe county and to authorize municipal license taxes for retail merchants affected by said Act, and graduated according to the arbitrary fee basis prescribed in sec. 5 of said Act, violates the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment to the Federal Constitution.

Louisville & G. E. Co. v. Coleman,
277 U. S. 32, 72 L. ed. 770;
Quaker City Cab Co. v. Pennsylvania,
277 U. S. 389, 72 L. ed. 927;
Airway Electric Corp. v. Day,
266 U. S. 71, 68 L. ed. 169;
Louis K. Liggett Co. v. Baldridge,
278 U. S. 105, 73 L. ed. 204;
Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264;
New State Ice Company v. Liebmann,
52 S. Ct. 371, 76 L. ed. (Adv. 479);

Such prescribed county licenses and authorized municipal licenses create additional arbitrary license taxes as between the owners of one store and of several stores, and as between the owners of stores where the same are located in the same county or in different counties.

Point 4.

Said Amended Bill (Tpn. R. 33-34) urged that the provisions of the last clause of sec. 5, and the provisions of section 11, and section 8 of said Act, as applied to the factual situation set up in said bill of complaint, arbitrarily taxes stocks of merchandise of retail merchants at $3.00 per thousand dollars of merchandise, while stocks of wholesalers are taxed at $1.50 per thousand, and arbitrarily discriminates in such rates of taxation on stocks of merchandise as between wholesalers who have merchandise in warehouses and retailers who have merchandise in warehouses, contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment to the Federal Constitution.

Louisville G. & E. Co. v. Coleman,
277 U. S. 32, 72 L. ed. 770;
Quaker City Cab Co. v. Pennsylvania,
277 U. S. 389, 72 L. ed. 927;
Airway Electric Corp. v. Day,
266 U. S. 71, 69 L. ed. 169;
Louis K. Liggett Co. v. Baldridge,
278 U. S. 105, 73 L. ed. 204;
Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264;
New State Ice Co. v. Liebmann,
52 S. Ct. 371, 76 L. ed. (Adv. 479);
Southern R. Co. v. Greene, 216 U. S. 400, 417;
Cotting v. Kansas City Stock Yards Co.,
183 U. S. 79.

This is also an additional discrimination not involved in the Indiana case (283 U. S. 527) or North Carolina case (52 S. Ct. 26).

Point 5.

Said Amended Bill (Tpn. R. 34-35) urged that the proviso contained in sec. 8 of said Act, undertaking to exempt filling stations engaged exclusively in the sale of gasoline and other petroleum products, as applied to the factual situation set up in said amended bill, creates an arbitrary and unreasonable classification and discrimination against all other owners of retail "stores" as defined in said Act, contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment to the Federal Constitution.

Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264;
Frost v. Corporation Commission,
278 U. S. 515, 73 L. ed. 483;
New State Ice Company v. Liebmann,
52 S. Ct. 371, 76 L. ed. (Adv. 479);
Williams v. Standard Oil Company,
278 U. S. 235, 73 L. ed. 287.

It is believed that no such point of discrimination was passed on in any Chain Store case previously considered by this Court.

Point 6.

The said Amended Bill, particularly sec. VIII. thereof (Tpn. R. 36 to 40), and sec. XVII. thereof (Tpn. R. 83 to 85), and the several Petitions of Intervention, particularly that part appertaining to the business of The Great Atlantic & Pacific Tea Company (Tpn. R. 129 to 133), show that said Act, particularly secs. 5 and 11 thereof, undertake to seize upon the interstate characteristics and incidents of operating many retail stores in Florida, in connection with the operation of similar retail stores in other States, as a basis for the discriminatory, arbitrary and unreasonable license taxes imposed upon the appellants severally, but not upon single store merchants whose businesses do not have such characteristics enjoyed beyond the limits of the State of Florida, and thereby privileges and rights enjoyed by the appellants severally beyond the State of Florida, and interstate commerce conducted by the appellants severally from other States into and out of the State of Florida, are arbitrarily taxed and burdened, contrary to the Due Process Clause of the 14th Amendment to the Federal Constitution, art. I. sec. 8 of the Federal Constitution; and contrary to art. IV. sec. 2 of the Federal Constitution.

Travis v. Yale & Towne Mfg. Co.,
252 U. S. 60, 65 L. ed. 460;
Shafer v. Farmers Grain Company,
268 U. S. 189, 69 L. ed. 909;
Furst v. Brewster, 282 U. S. 493, 75 L. ed. 478;

Ozark Pipe Line Co. v. Monier,
266 U. S. 555, 69 L. ed. 439;
Sprout v. City of South Bend,
227 U. S. 163, 72 L. ed. 833;
East Ohio Gas Company v. Tax Com. of Ohio,
283 U. S. 465, 75 L. ed. 1171;
Hans Rees' Co. v. Maxwell,
283 U. S. 123, 75 L. ed. 899;
Farmers Loan & Trust Co. v. Minnesota,
289 U. S. 204, 214, 74 L. ed. 371, 376;
Federal Trade Commission v. Pac. States T. P. Assn., 273 U. S. 52, 64, 71 L. ed. 534, 539.

This Point was not raised in the North Carolina case (52 S. Ct. 26), and could not have been raised in the Indiana case (283 U. S. 527), because Jackson's business, all his stores and all "integration" enjoyed in operating the same, existed in the single City of Indianapolis.

Point 7.

Said Amended Bill, particularly Sec. V. (Tpn. R. 23), and latter part of Sec. XI. (Tpn. R. 56), and Sec. XVI. (Tpn. R. 81-82), attack said Act in its entirety as in derogation of the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment to the Federal Constitution, and also upon the ground that when the invalid parts aforesaid are eliminated, the remainder will constitute a result not intended by the Legislature, thus rendering the whole Act nugatory.

Williams v. Standard Oil Company,
278 U. S. 235, 73 L. ed. 287;
Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264;
Grambling v. Maxwell, 52 Fed. (2) 256.

Point 8.

Said Amended Bill, Secs. XV. and XVI. (Tpn. R. 76 to 82), urged that appellee Comptroller's attempted administration of said Act, undertaking to exempt furniture dealers, filling stations that sell tire and tubes, automobile dealers, cigar stores, restaurants, and sundry other classes of store operators, regardless of whether single store operators or chain store operators, creates arbitrary and unreasonable discriminations against the appellants severally, contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment to the Federal Constitution.

Herkness v. Irion, 278 U. S. 92, 73 L. ed. 198;
Iowa-DesMoines Natl. Bank v. Bennett,
52 S. Ct. 133, 76 L. ed. (Adv. 164);
Yick Wo. v. Hopkins, 118 U. S. 356, 30 L. ed. 220.

Point 9.

That said amended bill sets up facts affirmatively showing that no basis of discrimination or of classifying appellant's stores differently from unit stores exists, and by the allegations of said bill appellants specifically and particularly denied the existence of any facts or grounds

of difference warranting discrimination or different classification as between chain or multiple stores and unit stores; yet the Supreme Court of Florida denied to Appellants the right to show by their evidence that the said Chapter 15624 is arbitrary, unreasonable and discriminatory.

Brinkerhoff-Faris Co. v. Hill,
281 U. S. 673, 74 L. ed. 1107;
Heiner v. Donnan, 52 S. Ct. 358,
76 L. ed. (Adv. 501);
Hovey v. Elliott, 167 U. S. 409, 417, 418, 446;
Manley v. Georgia, 279 U. S. 1, 6;
First Natl. Bank v. Anderson, 269 U. S. 341, 354,
70 L. ed. 295, 305;
Chaselton Corporation v. Sinclair,
264 U. S. 543, 68 L. ed. 841, 844;
United States v. Wilson, 7 Peters, 150, 160;
Arkansas v. Kansas & Texas Coal Company,
183 U. S. 185, 190.

Point 10.

Appellants severally, by their amended Petition for Rehearing (Tpn. R. 216 et seq.) and by their 10th and 16th assignments of error, complained that the majority opinion of the Supreme Court of Florida (Tpn. R. 157, et seq.), 141 So. 153, 158, and decree of affirmance (Tpn. R. 198-199), deprived the Appellants severally of their right to be heard on the factual situation set up in the amended bill, and deprived them of their property without due process of law, and without the equal protection of the laws, contrary to

the 14th Amendment to the Federal Constitution, in that said majority opinion and said decree were predicated upon what the Court assumed to be the factual situation from supposed judicial notice, as against the sworn facts set up in appellants' amended bill, admitted by motion to dismiss, and set up in sworn Petitions of Intervention.

Brinkerhoff-Faris Co. v. Hill,
281 U. S. 673, 74 L. ed. 1107;
Heiner v. Donnan, 52 S. Ct. 358, 76 L. ed. (Adv. 501);
Hovey v. Elliott, 167 U. S. 409, 417, 418, 446;
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First Natl. Bank v. Anderson,
269 U. S. 341, 354, 70 L. ed. 295, 305;
Chaselton Corporation v. Sinclair,
264 U. S. 543, 68 L. ed. 841, 844;
United States v. Wilson, 7 Peters 150, 160;
Arkansas v. Kansas & Texas Coal Company,
183 U. S. 185, 190.

VI.

That the Supreme Court of Florida, by its said opinion and decree of affirmance (Tpn. Tr. 198-199) sustained the validity of said Act and said administration thereof in its entirety. That the judgment and/or decree appealed from is the final judgment or decree in said cause; and the Supreme Court of Florida is the highest Court of the State of Florida in which decision in said cause can be had.

That the aforesaid Points were presented in Appellants' petition for allowance of appeal (Tpn. R. 218 to 226), and the aforesaid Points were also presented by the original assignments of error filed July 26, 1932 (Tpn. R. 228 to 232), and again by the amended assignments of error filed August 10, 1932, as of July 26, 1932.

That Appellants now severally submit that said Supreme Court of the United States has jurisdiction of said cause, and that the Appellants are entitled to be heard as of right upon appeal, pursuant to 28 U. S. C. A. sec. 344 (a), and 28 U. S. C. A. sec. 861 (a), as regards the matters covered by the aforesaid Points 1 to 7, inclusive. That said Supreme Court also has jurisdiction to decide the aforesaid Points 8, 9 and 10 upon writ of certiorari (29 USCA § 344 (b)) even if said Points had been presented alone, and when, as here, they are presented in connection with prior Points 1 to 7, inclusive, it is respectfully submitted that said Court upon appeal has jurisdiction to consider and decide all points involved in said cause, including the aforesaid Points 8, 9 and 10.

Respectfully submitted,

ROY M. STERNE,
THOMAS B. ADAMS,
Counsel for Appellants.

Copy of the foregoing Jurisdictional Statement received this 2nd day of September, A. D. 1932.

H. E. CARTER,
Of Counsel for Appellees.

JAN 3 1933
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

SUPREME COURT OF THE UNITED STATES

October Term, 1932

No. 301

LOUIS K. LIGGETT COMPANY,
a Corporation, et al.,
Appellants,

vs.

ERNEST AMOS, as Comptroller of
the State of Florida, et al.,
Appellees.

BRIEF FOR APPELLANTS.

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Floridian Press, Jacksonville, Fla.

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INDEX TO CONTENTS AND SYNOPSIS OF ARGUMENT.

	Page
NATURE OF CASE	1
OFICIAL REPORT	2
STATEMENT OF CASE	2
1. **Florida Act**	2
2. **The Record in Effect Presents a "Stipulated Case"**	5
3. **Matters of Law and Fact Presented by the Amended Bill and Petitions of Intervention**	6
4. **No Question as to Equity Jurisdiction**	8

5. Florida Court's Opinion Predicated Upon Alleged Judicial Notice 9
6. This is a Several Appeal 10
QUESTIONS INVOLVED AND SPECIFICATIONS OF ERRORS RELIED UPON 10
ARGUMENT 15
Point 1. Different County Discriminations Created by sub-sections (1), (3), (5), (7), (9), and (11) of § 5 of the Act Are Void 15
(1) Illustrations of How the Brackets of § 5 of the Act operate 16
(2) Authorities Relied Upon 23
(3) Appellees' Authorities Distinguished 32
Point 2.
Chain Store Warehouse Discrimination Created by §§ 8, 5 and 2 of the Act, imposing $3.00 per $1,000.00 on Value of Goods Carried, when only $1.50 per $1,000.00 is imposed on goods carried by regular Wholesalers, is Void 36
Point 3.
County and Municipal License Discriminations created and authorized by § 11 of the Act, graduated as per the State Licenses, are Void 51
(1) County License Discrimination 52
(2) Authorized Municipal License Tax 54
Point 4.
Arbitrary Administration of the Act by the Appellee Comptroller, undertaking to ex-

empt Many Retail Merchants not exempted by the Act, is Illegal 62

Point 5.

Invalid Portions of the Act renders the Act Void in its Entirety 70

Point 6.

Sundry Provisions of the Act operate to Burden Interstate Commerce, and deprive Appellants of the equal Privileges and Immunities enjoyed by the Citizens of the several States 72

Point 7.

Sub-sections (1), (2), (4), (6), (8) and (10) of § 5 of the Act, as applied to a single County, or as applied to the whole State, if there were no County Lines, create Arbitrary and Unreasonable Discriminations against Chain Store Owners, when their Businesses Severally are compared with the Businesses of their Competitors 85

(1) Many Functions of Appellants Severally, Necessary to the Operation of their Chain Store Enterprises, are Performed outside of Florida, and, therefore, cannot be taken into Account for the purpose of sustaining the Discriminations created by the Florida Act 90

(2) Economic Changes since the World War, including the changed Trading Habits of the Public, have necessitated

a very great increase in the number of retail units, both of chain stores and of independents; whereas the Florida Act seeks to deprive the Appellants severally of their Constitutional Right to increase the number of their Retail Units, and to freely compete in a Lawful Occupation of Life 100

(3) Improved Retail Distribution Practices, locally employed in Florida by Chain Stores, are being employed with equal Success by Voluntary Chains and Wide Awake Independents, with the result that no Taxable Difference exists by reason merely of Character of Ownership 122

(4) Present Economic conditions—Falling Prices; Hand to Mouth Buying; Over Night Truck Deliveries for Long Disttances; Itinerant Truck Merchants—Give Wide Awake Independents Advantages over Chain Store Retail Distributors, thus demonstrating an Additional Reason why the Florida Penalizing License Taxes on Chain Stores are Void 154

(5) A General Survey of the Factual Situation shows that no Taxable Difference exists between Appellants and their "Independent" Competitors 179

(6) Authorities Relied Upon to Support Point 7 185

(7) Anti-Chain Store and Similar Legislation Condemned in Many Cases 193
(8) Cases Relied upon by Appellees Distinguished 196

Point 8.

Day in Court Denied.—The Supreme Court of Florida Erred by its Majority Opinion in Predicating its Judgment upon alleged Judicial Notice, in disregard of the Sworn Facts set up in the Amended Bill and Petitions of Intervention, admitted by Appellees' Motion to Dismiss, thereby depriving Appellants severally of their Day in Court—Contrary to the Due Process Clause of the 14th Amendment 205

CONCLUSION 216

Appendix A—Copy of Florida Act 218

Appendix B—Under Separate Cover.

Appendix C—Copy West Palm Beach Ordinance 226

INDEX TO CASES.

Pages

Act of 37 Edward III. (1350) 192
Airway Electric Corp. v. Day, 266 U. S. 71 46-81
Allgeyer v. Louisiana, 176 U. S. 578 190
American F. C. Co. v. Buckskin Fibre Co. 72 Fed. 508 210
Amos v. Mosely, (Fla.) 77 So. 619 35
Arkansas v. Kansas & Texas Coal Co. 183 U. S. 185 213
Armour Packing Co. v. Lacey, 200 U. S. 226 201
Atcheson Etc. R. Co. v. U. S. 284 U. S. 248 ..... 75, 89, 156, 164
Baldwin v. Missouri, 281 U. S. 586 99
Bethlehem Motors Corp. v. Flynt, 256 U. S. 421 ..... 25, 28, 85
Brinkerhoff-Faris T&S Co. v. Hill, 281 U. S. 673 208-210
Bronk v. Chas. H. Scott Co. 211 Fed. 338 211
Brown, et al. v. Piper, 91 U. S. 37 210
Brown Foreman Co. v. Kentucky, 217 U. S. 573 200
Butchers Union Company Case, 111 U. S. 746 187
Caldwell v. North Carolina, 187 U. S. 622 ..... 24, 79, 122
Campania Etc. v. Collector, 275 U. S. 93 95
Chain Store Debate Manual (1931) 110
Chalker v. Birmingham Etc. R. Co. 249 U. S. 522 25
Chaselton Corporation v. Sinclair, 264 U. S. 543 87-213
Chicago v. Netcher, 183 Ill. 104 195
Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226 69
Child Labor Tax Case, 259 U. S. 20 22-35
City of Covington v. Dalheim (Ky.) 102 S. W. 829 194
City of Danville v. Quaker Maid Inc. 278 S. W. 98 193
City of Seattle v. Dencker, 108 Pac. 1086 194
Commonwealth v. Bibee Gro. Co. (Va.) 151 S. E. 293 42
Comp. Genl. Laws of Fla. 1927 § 893 49

Comp. Genl. Laws of Fla. 1927 § 896 49
Comp. Genl. Laws of Fla. 1927 § 1120 64
Comp. Genl. Laws of Fla. 1927 § 1149 64
Comp. Genl. Laws of Fla. 1927 § 1168 65
Comp. Genl. Laws of Fla. 1927 § 1197 4-37
Comp. Genl. Laws of Fla. 1927 § 1236 66
Cooley on Taxation, 4th ed. Vol. 1, § 259 28-58
Coppage v. Kansas, 236 U. S. 1 30
Cotting v. Kansas City Stock Yards Co.
183 U. S. 79 ..... 46, 59, 184, 190
Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282 87
Domestic Commerce Series, No. 9 106
Domestic Commerce Series, No. 59 119
Dr. Miles Medical Co. v. Park & Son Co. 220 U. S. 372 121
East Ohio Gas Co. v. Tax Commission of Ohio,
283 U. S. 465 82
Elgin, City of v. Winchester, 133 N. E. 205 28
Ellis v. A. C. L. R. Co. (Fla.) 66 So. 1005 56
Engel v. O'Malley, 219 U. S. 128 184
Ex Parte Irish, 250 Pac. 1056 28
Ex Parte Messer, (Fla.) 99 So. 320 30
Ex Parte Smith (Fla.) 128 So. 864 36-71
Fairmont Creamery Co. v. Minn. 274 U. S. 1 191
Farmers Loan & Tr. Co. v. Minn. 280 U. S. 204 95-99
Farrington v. Tokushige, 273 U. S. 284 201
Federal Trade Commission v. Pacific States
P. T. Assn. 273 U. S. 52 81
Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426 25
First Natl. Bank v. Anderson, 269 U. S. 341 9-214
First Natl. Bank of Boston v. Maine, 284 U. S. 312 99
Florida Constitution, Art. IX. § 11 183

Florida Laws, 1931, Chap. 14658, § 14 9
Florida Laws, 1931, Chap. 14658, § 33 6
Florida Laws, 1931, Chap. 15624 2
Francis Biedler II. v. S. C. Tax Comm. 282 U. S. 1 99
Frost v. Corporation Comm.
278 U. S. 515 ..... 34, 46, 71, 106, 150, 191
Furst v. Brewster, 282 U. S. 493 80
German Alliance Ins. Co. v. Home Water
Company, 226 U. S. 220 88
Gibbons v. Ogden, 9 Wheat. 1 77
Great Atlantic & Pac. Tea Co. v. Doughton,
144 S. E. 701 23-193
Great Atlantic & Pacific Tea Co. v. Maxwell,
154 S. E. 838 48-196
Great Atlantic & Pacific Tea Co. v. Morrisett,
58 Fed. (2) 991 43-198
Great Northern R. Co. v. Minnesota, 278 U. S. 503 199
Gregg Dyeing Co. v. Query (S. C.) 164 S. E. 588 33-48
Gulf Colo. Etc. R. Co. v. Ellis, 165 U. S. 150 199
Hans Rees' Sons Inc. v. N. C. 283 U. S. 123 88-89
Hardware Dealers Etc. Ins. Co. v. Glidden,
284 U. S. 151 89
Harkness v. Irion, 278 U. S. 92 69
Harper v. Galloway (Fla.) 51 So. 236 29
Harvard Business Review, July 1928, Vol. 6 161
Heiner v. Donnan, 285 U. S. 312 209
Home Tele. Co. v. Los Angeles, 227 U. S. 278 69
Hopkins v. So. Bell Tel. Co. 275 U. S. 393 199
Hovey v. Elliott, 167 U. S. 409 209
Indian Motocycle Co. v. U. S. 283 U. S. 570 106
I. C. C. Docket No. 23,400 136

Interstate Com. Comm. v. L& N. R. Co. 227 U. S. 88 213
Iowa-Des Moines Natl. Bank v. Bennett, 284 U. S. 239 .. 69
Lee v. Clearwater Growers Assn. (Fla.) 111 So. 722 153
Liberty Warehouse Co. v. Burley Etc. Assn.
276 U. S. 71 153
Liggett Company v. Amos, 141 So. 153 2
Liggett Company v. Baldridge, 278 U. S. 105 .... 61, 191, 193
Louisville Gas & E. Co. v. Coleman,
277 U. S. 32 ..... 23, 34, 46, 205
Manley v. Georgia, 279 U. S. 1 209
Matthews v. Rogers, 284 U. S. 521 204
Metropolis Theatre Co. v. Chicago, 228 U. S. 61 200
Meyer v. Nebraska, 262 U. S. 390 30-190
Minnesota v. Barber, 136 U. S. 320 ..... 21, 25, 78
Moffitt v. City of Pueblo (Colo.) 133 Pac. 754 194
Muller v. Oregon, 208 U. S. 412 87-131
New State Ice Co. v. Liebmann,
52 S. Ct. 371 ..... 26, 35, 122, 191, 203
Northwestern Nat. Ins. Co. v. Lee, 49 Fed. (2) 274 28
O'Gorman & Young v. Hartford Fire Ins. Co.
282 U. S. 251 89
Ohio Bulletin No. 156 (1932) 174
Ohio Oil Co. v. Conway, 281 U. S. 155 134
Ozark Pipe Line Co. v. Monier, 266 U. S. 265 81
Pac. Amer. Fisheries v. Alaska, 269 U. S. 269 202
Payne v. Central Pac. R. Co. 255 U. S. 228 5
Penney Stores Inc. v. Mitchell, 59 Fed. (2) 789 204
People ex rel Alpha Portland Cement Co. v.
State Tax Comm. (N. Y.) 129 N. E. 202 98
People v. Gilson (N. Y.) 17 N. E. 343 60-122
People v. Jenkins (N. Y.) 94 N. E. 1065 61

Quaker City Cab Co. v. Pennsylvania,
277 U. S. 389 23-186
Quong Wing v. Kirkendall, 233 U. S. 59 201
Railway Age, November 7, 1931 162
Seattle Trust Co. v. Roberge, 278 U. S. 116 88
Senate Document No. 12, 72 Cong. 1st Sess. 136
Senate Document No. 30, 72 Cong. 1st Sess. 75-83
Senate Document No. 100,
72 Cong. 1st Sess. 90, 92, 95, 96, 114, 116
Shafer v. Farmers Grain Co. 268 U. S. 189 80
Sheip Co. v. Amos (Fla.) 130 So. 699 32
Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304 178
Slaughter House Cases, 16 Wall. 36 187
Smith v. Cahoon, 283 U. S. 553 ..... 36, 46, 71, 191
So Gro. Stores Inc. v. Tax Comm. 55 Fed. (2) 931 203
Southern R. Co. v. Greene, 216 U. S. 400 46-190
Southwestern Oil Co. v. Texas, 217 U. S. 114 34
Sprout v. City of South Bend, 277 U. S. 163 82
Standard Oil Co. v. United States,
283 U. S. 163 ..... 75, 106, 131, 134, 137, 171
State v. Dillon (Fla.) 79 So. 29 56
St. Louis Comp. Co. v. Arkansas, 260 U. S. 346 94
St. Louis & O'Fallon R. Co. v. U. S. 279 U. S. 520 134
St. Louis Etc. R. Co. v. U. S. 279 U. S. 514 106
Sterling, Governor of Texas v. Constantin,
287 U. S. U. S. ..... , decided Dec. 12, 1932 209
Street v. Lincoln S. & D. Co. 254 U. S. 88 6
Swift & Co. v. United States, 276 U. S. 319 137
Tax Commissioners v. Jackson, 283 U. S. 527 86
Teuton v. Thomas (Fla.) 129 So. 330 31
Toyota v. Hawaii, 226 U. S. 184 201

Travis v. Yale & Towne Mfg. Co. 252 U. S. 60 84
Truax v. Raich, 239 U. S. 33 190
United States Daily, June 8, 1932 155
United States Daily, Sept. 15, 1932 170
United States v. Wilson, 7 Peters, 150 212
Ward v. Maryland, 12 Wall. 418 ..... 24, 28, 83
Ward Baking Co. v. Fernandina, 29 Fed. (2) 789 27
Williams v. Standard Oil Co. 278 U. S. 235 36-71
Woolworth Co. v. Harrison, 156 S. E. 904 24-193
Wolff Packing Co. v. Court of Industrial Relations,
262 U. S. 522 30
Yick Wo. v. Hopkins, 118 U. S. 356 69

SUPREME COURT OF THE UNITED STATES

October Term, 1932

No. 301

LOUIS K. LIGGETT COMPANY,
a Corporation, et al.,
Appellants,

vs.

ERNEST AMOS, as Comptroller of
the State of Florida, et al.,
Appellees.

BRIEF FOR APPELLANTS.

NATURE OF CASE.

This is an appeal by Appellants, as Plaintiffs and Intervenors below, from a final judgment of the Supreme Court of Florida, R 148, affirming a final decree of the Circuit Court, in and for Leon County, Florida, R 101, which dismissed on motion of Appellees, R 77, the amended bill of complaint, R 2 to 76, filed by three of the appellants to test the validity of, and restrain the enforcement of, Chapter 15624, Laws of Florida, 1931, also known as the Florida Chain Store License Tax Act.

OFFICIAL REPORT.

Both Florida Courts held the Act valid as against all attacks made in the amended bill and petitions of intervention. The Justices of the Supreme Court of Florida were divided in their opinions, four to two. The majority and dissenting opinions appear R 105, to 147, and are officially reported as

Louis K. Liggett Company v. Amos, 141 So. 153 to 171.

STATEMENT OF CASE.

1. Florida Act.

Chapter 15624, Laws of Florida, 1931, imposes certain state and county occupational license taxes, and authorizes certain municipal occupational license taxes, graduated upon ascending scales, dependent upon the number of stores opened and operated, (1) entirely in a single county, and (2) in different counties, where a penalty is attached on companies that operate in more than one county. A copy of the Act is shown by Appendix A to this brief.

The definition of a "store" is found in section 8 of the Act. That section makes the unit of taxation a *place* where goods, wares or merchandise are sold *at retail*. According to this statutory definition, peanut stands or bootblack stands are such places or "stores", the same as large department stores.

The retail store operators upon whom the taxes are im-

posed are defined first in section 7 of the Act.

The application of the Act is further defined by section 5 of the Act, reading in part as follows:

> "Every person, firm, corporation, association or copartnership opening, establishing, operating or maintaining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments."

Multiple Ownership—Chain Store Ownership—is made the test of application if there is any operation of more than one retail unit. Thus the Act is made inapplicable to groups of "stores" *separately owned*, even though the units of such groups are affiliated with a wholesaler and act cooperatively in what are known as "Voluntary Chains."

Sub-sections or Brackets (1), (2), (4), (6), (8) and (10) of Section 5 of the Act impose a graduated State License Tax, ranging from $5.00 for the operation of one "store," up to $40.00

> "upon each store in excess of seventy-five, where all are located in *one* County."

Sub-sections or Brackets (1), (3), (5), (7), (9) and (11) of Section 5 of the Act impose a graduated State License Tax, ranging from $5.00 for the operation of one "store," up to $50.00

"upon each store in excess of seventy-five, where the same are located in *different* counties."

The last clause of section 5 of the Act, and another clause about the middle of section 2 of the Act, impose an additional State License Tax of $3.00

"for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store."

The words "for sale in such store," at the end of section 5 of the Act, are explained by section 2 of the Act, requiring the applicant for a license to show the value of all goods

"owned by the applicant and held in storage to be sold in or through such store."

Section 8 of the Act, as before noted, confines its operation to *retail* stores, and, therefore, the ordinary wholesaler, though operating as a part of a "Voluntary Chain," remains subject only to $1.50 per thousand dollars of value of stock carried in his or its warehouse or warehouses, pursuant to § 1197 Compiled General Laws of Florida, 1927 (§ 926 Revised General Statutes of Florida, 1920).

Section 11 of the Act imposes county taxes to the extent of twenty-five per cent. of the combined State License Taxes, and authorizes Municipal License Taxes to the extent of twenty-five per cent of the combined State License Taxes. The twenty-five per cent County Tax so required,

and the twenty-five per cent municipal tax so authorized, are to be graduated on the scale defined for State License Taxes where all stores are operated in one County—that is to say, on the scale defined by sub-sections (1), (2), (4), (6), (8) and (10), of section 5 of the Act. But the scale so to be applied must be confined to the stores in each County or City, as the case may be. It thus appears that the required county license taxes and the authorized municipal license taxes are cumulative and pyramided upon the same scheme as that defined for State License Taxes—in each case the greater the number of stores the greater the discrimination.

The latter part of section 4 of the Act provides a civil penalty of twenty-five per cent for failure to procure licenses within the times required.

Section 9 of the Act provides criminal penalties, and makes each day's violation a separate offense.

2. The Record in Effect Presents a "Stipulated Case."

The sworn facts set up in the amended bill, R 2 to 76, and in the petitions of intervention, R 84, R 89 and R 97, were not denied by the appellee officials by any form of affidavit, answer or other such pleading. On the contrary, the appellees merely filed a motion to dismiss, R 77, and thereby admitted as true all matters well pleaded in the amended bill.

Payne v. Central Pacific R. Co.,
255 U. S. 228, 232;

Street v. Lincoln S. & D. Co.,
254 U. S. 88, 89,

and other cases cited in appellants' petition for rehearing, filed before the Supreme Court of Florida, R 149-150.

The Florida equity practice in that behalf is the same as the Federal equity practice, because in 1931 Chapter 14658 was passed adopting very largely the Federal Equity Rules. Section 33 of that Act is a modified form of Rule 29 Federal Equity Rules. As to the effect of the motion to dismiss, Mr. Justice BROWN, of the Supreme Court of Florida, said in this case, R 145 (141 So. text 170):

> "The motion to dismiss the amended bill in this case, like a demurrer, admits all facts well pleaded in the amended bill. Taking these facts as true, as we must in reviewing the action of the lower Court on the motion to dismiss, my conclusion is that the Court below erred in granting such motion and in denying the temporary restraining order."

3. Matters of Law and Fact Presented by the Amended Bill and Petitions of Intervention.

Discriminations appearing upon the face of the Florida Act in derogation of the 14th amendment, are specifically set out in section VII. (a) to (f) of the amended bill, R 14 to 19.

The Florida factual situation, as of the date of this

suit, is set forth in other sections of the amended bill and in the several petitions of intervention.

Section III. of the amended bill, R 4, and corresponding sections of the several petitions of intervention, show the number of stores operated by the several appellants in different counties of the State.

Section IV. of the bill, R 5, shows the legislative history of the Act.

Sections V. and VI. of the amended bill, R 8 to 14, state briefly the historical development of chain stores, and the efforts made by chain store owners to keep pace with changing economic conditions.

Section VIII. of the amended bill, R 19, and section IX. (Erroneously numbered XX.) R 22, show how Louis K. Liggett Company operates its twenty-two retail drug stores in Florida, and how its competitors operate as single store owners, or as affiliated in "Voluntary Chains."

Section X. of the amended bill, R 25, and section XI. of the amended bill, R 27, show how the appellant, Winn & Lovett Grocery Company operates its fifty-eight retail grocery stores in Florida, and how its competitors operate, either as single store operators, or as affiliated in "Voluntary Chains."

Section XII. of the amended bill, R 35, shows how the appellant, Paxson's Inc. operates its seven Florida retail shoe stores, and one Georgia retail shoe store, and how its competitors operate.

Section XIV. (a) to (o) of the amended bill, R 37, shows great diversity of operation among chain store owners, and that no one practice of operation can be found applicable to all chain stores alike. That operating practices

utilized by appellants severally, and capable of local application to their Florida retail units, are now being employed by single store owners, and also by singly owned stores affiliated in "Voluntary Chains." That no taxable difference can be found in Florida between the chain store units of the appellants severally and the stores of their competitors.

Sections XV. and XVI. of the amended bill, R 49 to 53, show how the appellee Comptroller, and the Attorney General have interpreted the Act and are arbitrarily administering the Act.

Section XVII. of the amended bill, R 54, shows how privileges, or advantages if they can be deemed such, exercised or enjoyed by the appellants severally beyond the limits of the State of Florida, part of which constitute interstate commerce, are being burdened and unlawfully taxed by the provisions of the Florida Act.

Section XVIII. of the amended bill, R 56, shows that the appellants tendered to the appellee tax collectors the taxes payable under the law existing at the time the Act under attack was passed, viz. § 1197 Compiled General Laws of Florida 1927, but that said appellee tax collectors refused to accept the same, and that they and the appellee Comptroller are threatening civil and criminal penalties.

The several petitions of intervention, R 84, R 89, and R 97, adopted the averments of the amended bill, and, in addition, set forth the particular situation of each intervenor.

4. **No Question as to Equity Jurisdiction.**

The Circuit Court in and for Leon County, Florida,

and the Supreme Court of Florida, treated the amended bill as a class suit, properly filed in equity, to test the validity of the Act. Section 14 of Chapter 14658, Laws of 1931, the new Florida Equity Practice Act, is the same as Federal Equity Rule 38. The majority opinion, R 105, 141 So. 154, expressly held that the bill was properly filed under section 14 of the new Florida Equity Practice Act. The dissenting opinion of Mr. Justice BROWN, bottom R 124, (141 So. text 162, middle first column), held to the same effect.

The motion to dismiss, R 77, attacked the amended bill on its merits, and contended, notwithstanding the sworn facts alleged, that the Act was valid in all respects.

The propriety of the procedure under State law having been thus expressly recognized and conceded, the question of whether the Florida Courts had equity jurisdiction to consider the merits of the questions raised was set at rest, and is not here open for further consideration.

First Natl. Bank v. Anderson,
269 U. S. 341, 70 L. ed. 295, 2 h. n.

5. **Florida Court's Opinion Predicated Upon Alleged Judicial Notice.**

The majority opinion of the Supreme Court of Florida, R 105 to 121 (141 So. text 158), was predicated upon what the majority opinion announced was judicially known to be the facts. In so doing, the Court disregarded the sworn facts set up in the amended bill and petitions of intervention. The error of the Supreme Court of Florida in that behalf was sharply brought to that Court's attention by

the first section of appellants' petition for rehearing, now appearing R 148 to 153.

6. This is a Several Appeal.

The Appeal to the Supreme Court of Florida, R 102, was a several appeal. In like manner, the appeal to this Court, R 160 to 165, is a several appeal. In like manner, the assignments of error, R 172 to 176, are presented on behalf of the appellants severally. It follows, therefore, that each appellant is entitled to have this appeal considered as if each such appellant was the only party complaining.

QUESTIONS INVOLVED AND SPECIFICATIONS OF ERRORS RELIED UPON

Point 1.

DIFFERENT COUNTY OR COUNTY LINE DISCRIMINATIONS.—As applied to the Factual Situation Presented, the Supreme Court of Florida erred in Sustaining the Validity of Sub-sections (1), (3), (5), (7), (9) and (11), of § 5 of the Act, creating Arbitrary and Unreasonable State License Discriminations between Appellants, severally doing business in different Counties, and other Merchants, Single Store or Chain Store, confining their businesses to single Counties, Contrary to the Due Process Clause, and the Equal Protection of the Laws Clause of the 14th Amendment.

This is in substance the 3rd and 15th assignments of error, R 172 and R 176. The third assignment of error complains that the holding of the Supreme Court of Florida as last aforesaid violates both the due process clause and the equal protection of the laws clause. The fifteenth assignment of error complains that such discrimination, based on county lines only, violates the equal protection of the laws clause.

Point 2.

CHAIN STORE WAREHOUSE DISCRIMINATION.—As Applied to the Factual Situation presented by the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in sustaining the Discrimination created by §§ 8, 5 and 2 of the Act, imposing a license Tax of $3.00 per $1,000.00 of value on Goods carried in the Warehouses of some of the Appellants, while Wholesale Merchants, though affiliated as Parts of "Voluntary Chains," remain subject to the old Law, requiring the Payment of only $1.50 per $1,000.00 of value on their Stocks—Contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment.

This is in substance the fifth assignment of error, R 173.

Point 3.

COUNTY AND MUNICIPAL LICENSE DISCRIMINATIONS.—As applied to the Factual Situ-

ation Presented, the Supreme Court of Florida erred in Sustaining the Validity of Section 11 of said Act, imposing Cumulative, Discriminatory County License Taxes, and Authorizing Discriminatory Municipal License Taxes—Contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment.

This is in substance the fourth assignment of error, R 173.

Point 4.

ARBITRARY ADMINISTRATION OF THE ACT.—The Supreme Court of Florida erred in Sustaining the Comptroller's Arbitrary and Discriminatory Administration of the Act, whereby he undertook to Exempt Furniture Dealers, Filling Stations that sell Tires and Tubes, Automobile Dealers, Cigar Stores, Restaurants, and other Classes of Store Operators, regardless of whether Single Store Operators or Chain Store Operators—Contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment.

This is in substance the 8th assignment of error, R 174.

Point 5.

ACT VOID IN ITS ENTIRETY.—As Applied to the Factual Situation Presented by the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in sustaining Chapter 15624 in its Entirety.

This is in substance the 1st, 10th, 11th and 12th assignments of error, R 172 and R 175. The first assignment of error, R 172, complains generally of the holding of the Supreme Court of Florida, sustaining the Act in its Entirety, notwithstanding the several assaults made thereon in the amended bill and petitions of intervention. The tenth assignment of error, R 173, makes the same general complaint predicated upon the due process clause only. The eleventh assignment of error is the same, except that it is predicated upon the equal protection of the laws clause. The twelfth assignment of error makes the same general complaint on account of the discriminations created by the Act as applied to the number of stores located in any one County.

Point 6.

COMMERCE CLAUSE AND EQUAL IMMUNITIES CLAUSE VIOLATED.—As Applied to the Factual Situation Presented, the Supreme Court of Florida erred in Sustaining the Validity of said Act as against the Objections that the same Operates to burden Interstate Commerce conducted by Appellants Severally, and operates to deprive Appellants Severally of the same Privileges and Immunities enjoyed by Citizens of the State of Florida—Contrary to the Commerce Clause, § 8, Art. I., and contrary to the Equal Privileges and Immunities Clause, § 2, Art. IV. of the Federal Constitution.

This is in substance the seventh assignment of error,

R 174. It is also substantially Point 6 of the "Jurisdictional Statement," pages 11 and 12 thereof, heretofore filed in this cause.

Point 7.

SINGLE COUNTY STATE LICENSE DISCRIMINATIONS.—As Applied to the Factual Situation set up in the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in sustaining the Validity of Sub-sections (1), (2), (4), (6), (8) and (10), of § 5 of the Act, creating Arbitrary and Unreasonable State License Discriminations in favor of Single Store Retail Merchants, and against Chain or Multiple Store Retail Merchants, all doing business in one County—Contrary to the Due Process Clause and the Equal Protection of the Laws Clause of the 14th Amendment.

This is in substance the 2nd, 13th and 14th assignments of error, R 172 and R 176. The second assignment of error complains that said holding violates the due process clause and equal protection of the laws clause. The thirteenth assignment of error complains of single county discrimination as in violation of the equal protection of the laws clause only. The fourteenth assignment of error complains of such single county discrimination as in violation of the due process clause.

Point 8.

DAY IN COURT DENIED.—The Supreme Court of Florida Erred by its Majority Opinion in

Predicating its Judgment upon alleged Judicial Notice, in Disregard of the Sworn Facts set up in the Amended Bill and Petitions of Intervention, admitted by Appellees' Motion to Dismiss, thereby depriving Appellants severally of their Day in Court—Contrary to the Due Process Clause of the 14th Amendment.

This is in substance the 9th and 16th Assignments of Error, R 174 and R 176. This Point is also the substance of Points 9 and 10, pages 13 to 15, of the "Jurisdictional Statement," heretofore filed in this cause.

ARGUMENT

Point 1.

DIFFERENT COUNTY OR COUNTY LINE DISCRIMINATIONS.—As applied to the Factual Situation Presented, the Supreme Court of Florida erred in sustaining the Validity of Sub-sections (1), (3), (5), (7), (9) and (11) of Section 5 of the Act, creating Arbitrary and Unreasonable State License Discriminations between Appellants, severally doing business in different Counties, and other Merchants, single store or chain store, confining their businesses to Single Counties, Contrary to the Due Process Clause, and the Equal Protection of the Laws Clause of the 14th Amendment.

This County line discrimination, its operation and ef-

fect, were complained of in § VII. (b) of the amended bill, R 15, in § IX. of the amended bill, R 22, in § XI. of the amended bill, R 27, and in the several petitions of intervention. Those matters, like others well pleaded, were admitted by the motion to dismiss. The adverse ruling of the Supreme Court of Florida on this point is the subject-matter of the 3rd and 15th assignments of error, R 172 and R 176.

All of the appellants operate stores in different counties of Florida except Montgomery Ward & Company, and, if its freedom of contract is to be preserved, it is entitled to open other stores in different counties of the State, if it so desires, without being subject to arbitrary and unreasonable discriminations in the matter of license taxes, and, therefore, that appellant has the same right to complain of the county line discriminations as each of the others.

(1) *Illustrations of How the Brackets of § 5 of the Act Operate.*

It is shown by the amended bill, § VII. (b), R 14 to 19, that one George C. Blume operates in Duval County, Florida, thirty-seven retail grocery stores known as "Whiddon Stores," and operates no store in any other part of the State. To apply brackets (1), (2), (4) and (6) of § 5 of the Florida Act to his stores, we get the following as the arbitrary state license fees to be paid, exclusive of the $3.00 per $1,000.00 on stock carried, as required by the lasf sentence of § 5 of the Act, and exclusive of the county and municipal license taxes further required by § 11 of the Act:

TABLE 1—(Single County)

1	Store	$ 5.00
14	Stores at $10.00	140.00
15	Stores at $15.00	225.00
7	Stores at $20.00	140.00
37	Stores, total	$510.00
	Average per Store	$13.78

But suppose Mr. Blume concludes to open one additional store in an adjoining County, that is to say, in the City of Fernandina, or in the City of St. Augustine, thereby giving him thirty-eight (38) stores, the original thirty-seven in Duval County, and the one additional store in a different County. In that case the Act requires the application of sub-sections (1), (3), (5) and (7) of § 5, and the Table would be as follows:

TABLE 2—(Different Counties)

1	Store	$ 5.00
14	Stores at $15.00	210.00
15	Stores at $20.00	300.00
8	Stores at $30.00	240.00
38	Stores, total	$755.00
	Average per Store	$19.60

It is thus seen that the average per store would be increased from $13.78 to $19.60, or almost one-half, and that the total increase, by reason of establishing one store across the County line, would be $245.00. In other words, Mr. Blume, in order to enlarge his business by one additional store, if set up in an adjoining County, or even in a

distant County, must pay *forty-nine* times as much arbitrary state license fee for the privilege of opening that one additional store as is required of the merchant who would be his competitor across the street in the new location. This is the inescapable result if we charge all of the increase to the one additional store; but if we distribute the increase, then the burden becomes *retroactive* upon all of the original thirty-seven stores to make the burden thereof equal to that imposed upon the one new store opened in a different County.

It also appears from Exhibit 3 to the amended bill, R 63, that Winn & Lovett Grocery Company owns and operates in the City of Jacksonville, Duval County, 23 grocery stores. Suppose that the Winn & Lovett Grocery Company operated 225 stores in the City of Jacksonville, and that it owned and operated no store in any other part of the State of Florida? The Florida Act would then require the application to the business of Winn & Lovett Grocery Company of sub-sections (1), (2), (4), (6), (8) and (10) of Sec. 5 of the Act, and we would get the following Table to determine the arbitrary state license fee payable:

TABLE 3—(Single County)

1	Store	$ 5.00
14	Stores at $10.00	140.00
15	Stores at $15.00	225.00
20	Stores at $20.00	400.00
25	Stores at $30.00	750.00
150	Stores at $40.00	6000.00
225	Stores, total	$7520.00
	Average per Store	$33.42

Suppose again, that having 225 stores in Duval County, the Winn & Lovett Grocery Company desired to open one additional store in the adjoining county of St. Johns, or in some distant County of the State of Florida. In that case the Act would require the application of sub-sections (1), (3), (5), (7), (9) and (11) of Sec. 5, in order to determine the arbitrary state license fees required and we would get the following Table:

TABLE 4—(Different Counties)

1	Store	$ 5.00
14	Stores at $15.00	210.00
15	Stores at $20.00	300.00
20	Stores at $30.00	600.00
25	Stores at $40.00	1000.00
151	Stores at $50.00	7550.00
226	Stores, total	$9665.00
	Average per Store	$42.76

It is thus seen that by opening one new store in a different County the average per store would be increased from $33.42 per store arbitrary state license fee, to $42.76 per store, such increase operating *retroactively* upon the original 225 stores in the one County so as to make their average equal to that of the one new store established in a different County. If such retroactive distribution be not considered, then the total arbitrary state license fee taxable by reason of opening the one additional store in a different County is the difference between $7520.00 and $9665.00, or the prohibitive sum of $2145.00. In short, the Company would have to pay for the privilege of opening

one new store across the County line *four hundred and twenty-nine* times as much arbitrary state license fee as would be required of its competitor across the street from such store opened in a different County.

We may further illustrate the discrimination between two merchants both of whom are multiple store owners. Suppose Merchant Jones has three stores located in the villages of A, B and C in one County, at distances five miles apart. Merchant Smith has stores in towns B, C and D, also each five miles apart; but towns A, B and C are in one County and village D is over the county line. Merchant Jones pays $25.00, $5.00 for the first store and $10.00 each for the other two, an average of $8.00 and a fraction. Merchant Smith pays $35.00, $5.00 for the first store and $15.00 for the other two, an average of nearly $12.00 or 1½ times as much. Merchant Jones' stores may be located on good corners, occupy large spaces, carry large stocks, and do a $100,000.00 volume a year each. Merchant Smith's stores may be in poor sections, occupy very little space, and do a volume of $20,000.00 a year each. Merchant Jones' stores may be in the large cities of A, B and C, in one County, and may be large central stores. Merchant Smith's stores may be in the smallest country settlements, in one room shacks, and be simply little community trading places. Yet for the great privilege of having his stores in two different Counties Merchant Smith pays nearly 50% more tax. As you rise in the brackets the discrimination becomes worse, and the reason for it less apparent.

The argument on the county line discrimination makes itself. This is not classification based on any principle,

reason or logic; it is classification and discrimination gone wild. No inspection is required by the Act; no additional duties are imposed upon officials by reason of doing business in different counties. An Applicant for a license, doing business in different counties, makes his application to a single official, the Comptroller, instead of to the several Tax Collectors of the different counties. The Comptroller takes the money, issues the license and that is the end of the matter until the next taxpaying period arrives. The addition of a new store or stores in different counties cannot possibly justify more than the addition of per unit license fees. No possible justification can be found for retroactive increases on all of the original stores which may be in a single County, as required by sub-sections (3), (5), (7), (9) and (11) of section 5 of the Act.

It is obvious that the purpose, effect and operation of such license provisions are to prohibit or to deter any merchant from doing a retail business in more than one County of the State, and also to prohibit or to deter any merchant from doing a retail business under more than one roof in a single county. It is thus apparent that the Act is rank anti-chain store legislation—that its real purpose, under the guise of taxation, is the suppression of chain store retail distribution.

In the case of

Minnesota v. Barber, 136 U. S. 320,

it is said:

"The rule is general, with reference to the enact-

> ments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation . . . It is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

In the

Child Labor Tax Case, 259 U. S. 20, 37,

it is said:

> "In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"

(2) *Authorities Relied Upon.*

After diligent search we have been unable to find any decided case, State or Federal, where such a scheme of license taxation was involved, based, as this one is, on artificial county lines. Such a scheme of discrimination appears to be one of first impression, and therefore, we must needs resort to merely analogous cases, to find applications of the due process clause and the equal protection of the laws clause that will condemn such form of discrimination.

In the case of

Great Atlantic & Pacific Tea Company v. Doughton, 144 S. E. 701,

the North Carolina Court condemned the North Carolina chain store statute of 1927, which required the payment of a license tax of $50.00 per store on all stores if more than five were operated. The North Carolina Court cited in that case the applications of the 14th Amendment made by this Court in

Louisville Gas & E. Co. v. Coleman,
277 U. S. 32; and
Quaker City Cab Co. v. Pennsylvania,
277 U. S. 389.

The chief cause for the Carolina's Court's condemnation of the statute there involved was that after the imaginary line between five stores and six stores was crossed, the Act became *retroactive* on the original five stores

owned. In that sense the statute there condemned is analogous to the imaginary county line discrimination here under consideration, and the statute here should be condemned for like reasons. Precisely the same situation was involved in the Georgia case of

F. W. Woolworth Co. v. Harrison (Ga.)
156 S. E. 904.

The Georgia Statute there condemned also provided that when the imaginary line between five stores and six stores was crossed the fee of $50.00 per store would become *retroactive* on the original five stores. So here, when either Blume, or any other merchant now doing a chain store business in one County, opens a new store in another County, the very great increase in license taxation will immediately become retroactive on all of the original stores operated in the first County.

The nearest approach in the decisions of this Court which we have been able to find, applicable to the *county line* discriminations now under consideration, are *state line* discriminations, condemned in the following cases.

Ward v. Maryland, 12 Wall. 418, 429, 430, 431, 432, involving traders' or merchants' license tax—$12.00 to $150.00 per annum for residents, and $300.00 per annum for non-residents.

Caldwell v. North Carolina, 187 U. S. 622, 626, 627, involving drummers' license tax.

Minnesota v. Barber, 136 U. S. 313, 320, 326, involving meat inspection requirements.

Chalker v. Birmingham, Etc. R. Co. 249 U. S. 522, involving contractors' license—$25.00 for residents and $100.00 for non-residents.

Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, involving license tax on automobile manufacturers, or persons or corporations engaged in selling the same, but discriminating against non-residents who did not invest a certain amount in securities of the State, or of its sub-divisions.

Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, requiring insurance companies to pay commissions, on business done in the State, only to residents of the State.

In some of these cases, such as Bethlehem Motors Corporation v. Flynt, the Court condemned the tax as being in derogation of the immunities and equal privileges clause, of § 2, art. IV. of the constitution, and as being in derogation of the equal protection of the laws clause of the 14th amendment. Both of those clauses have the same object in view as the Commerce Clause, sec. 8, art. I., i. e. that so far as domestic trade relations are concerned, no discrimination shall be created in favor of one part of the citizens against another; that all commercial relations, whether intrastate or interstate, shall be free and without restriction; that in such commercial relations no one of the same class shall have a "law made advantage" over another.

The recent decision of this Court in

New State Ice Company v. Liebmann, 52 S. Ct. 371, 76 L. ed. 477,

restates principles which we think are applicable to the kind of discriminations now under consideration. The Court there condemned an Oklahoma Statute undertaking to vest in the Corporation Commission the right to issue a permit for the manufacture of ice only upon proof that such additional plant was a matter of public convenience and necessity. The sixth headnote of that case (L. ed.) reads:

> "The State has no power, under the 14th Amendment, arbitrarily to deny or unreasonably to curtail the common right to engage in a lawful private business, such as the manufacture and sale of ice."

In the course of the opinion the Court observed that the statute

> "does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it."

Also that the statute operated to

> "arbitrarily interfere with private business or pro-

> hibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

It seems to us that that precisely defines the effect and operation of sub-sections (3), (5), (7), (9) and (11) of sec. 5 of the Florida Act.

We find several lower Federal Court decisions and a number of state court decisions which are closely analogous, and which have uniformly condemned the character of discrimination under discussion.

In the case of

> Ward Baking Company v. City of Fernandina, (Fla.) 29 Fed. (2) 789,

it appeared that the City of Fernandina, by Ordinance prescribed a scale of license taxes—for bakeries generally $5.00; bakeries outside of the City delivering wholesale within the City $100.00; bakeries outside the City, delivering retail within the City, $150.00; agents for non-resident bakeries, $100.00. The Ward Baking Company operated a bakery in the City of Jacksonville, Florida, and through its agent sold and delivered bakery products in the City of Fernandina, but had no plant or factory in that City. Injunction was sought to prevent the enforcement of the Fernandina Ordinance. The Court sustained the bill, and held the Ordinance, discriminating against the agent of the Jacksonville concern, void, as in derogation of sec. 2, Art. IV. of the Federal Constitution, and in derogation of the due process clause and the equal protection of the laws

clause of the 14th Amendment. In arriving at those conclusions, the Court cited

Ward v. Maryland, 12 Wall. 418; and
Bethlehem Motors Corp. v. Flynt, 256 U. S. 426.

Similar Municipal Ordinances discriminating against non-residents of cities were condemned in

Ex Parte Irish, (Kan.) 250 Pac. 1056,
61 A. L. R. 332;
City of Elgin v. Winchester (Ill.) 133 N. E. 205,
22 A. L. R. 1481,

and in other cases appearing in the A. L. R. Annotations to the two decisions last cited.

In the case of

Northwestern Nat. Insurance Co. v. Lee,
49 Fed. (2) 274,

a 3-Judge Court condemned a statute discriminating against non-resident insurance agents. In

Cooley on Taxation, 4th ed. Vol. 1, § 259,

it is said:

"It is immaterial on what ground the selection is made, whether it be because of residence in

> a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose; or because of any other reason; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies."

Prior to the decision in this case the Supreme Court of Florida had in several cases, not involving merchants, condemned license taxes where there was discrimination predicated upon County lines. We think the decisions in those cases were sound and ought to control the objection to the County line discriminations now under discussion. Nevertheless the majority opinion of the Supreme Court of Florida in this case departed from its prior decisions of that character, and undertook to apply the decision of this Court in the Indiana case, notwithstanding the fact that the Indiana case involved no such scheme of discrimination. The case of

Harper v. Galloway, 58 Fla. 255, 51 So. 236,

involved a statute requiring residents of the state who were not residents of a particular county to give notice of intention to hunt and pay a license tax, whereas no such notice or license tax was required of residents of that County. Those discriminations were held void as in derogation of the 14th amendment, and as in derogation of similar pro-

visions of the State Constitution. See 9th and 10th headnotes.

In the case of

State v. Bryan, 87 Fla. 56, 99 So. 327,

a similar decision was rendered by the Florida Court, dealing with discriminatory hunting license statutes where the discrimination was predicated upon county lines. In both of these cases it is to be noted that the extent of the discrimination could not be classified as confiscatory, or even prohibitive, and, moreover, neither case dealt with any of the ordinary occupations of life; and yet in each case the statute was condemned because there was a deprivation of the equal protection of the laws.

In the case of

Ex Parte Messer, 87 Fla. 92, 99 So. 330,

the Court condemned a statute which sought to impose burdens and restraints upon persons coming into one county from another county to employ labor. In arriving at the conclusions stated in the 5th, 7th and 9th headnotes, the Court cited and followed

Meyer v. Nebraska, 262 U. S. 390;
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522;
Coppage v. Kansas, 236 U. S. 1.

It seems to us that those decisions of this Court, so relied upon, are equally applicable to condemn the county line discrimination here complained of.
In the case of

Teuton v. Thomas, 100 Fla. 78, 129 So. 330,

the Court condemned another county line discrimination involved in a stock law applicable to one county, and in support of the decision in that case the Court quoted from State v. Bryan, supra, the following:

> "Classifications by counties or otherwise for the purpose of prescribing regulations or exactions that in effect impose burdens on some of the citizens of the state that in kind or extent are not imposed upon other citizens of the state under practically similar conditions with no conceivably just basis for the classifications or discriminations, constitute a denial to those injuriously affected of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution."

Justice BROWN and Justice ELLIS of the Florida Supreme Court, thought these prior decisions controlling as to the county line discriminations complained of. See dissenting opinion, R 146-147, and 141 So. Text 171.

(3) *Appellees' Authorities Distinguished.*

No such character of discrimination was involved in the Indiana case, 283 U. S. 527, or in the North Carolina case, 154 S. E. 838, affirmed by this Court per curiam, 52 S. Ct. 26. Therefore, the appellees can get no comfort from either of those decisions in undertaking to sustain the kind of discrimination now under review.

In the Court below, as the 10th ground of the motion to dismiss indicates, R 77, counsel for appellees contended that the statute in question in all its provisions must be sustained, because it is "geographically uniform" in its operation, and to support that contention, counsel for appellees relied upon

Sheip Co. v. Amos, 100 Fla. 863, 130 So. 699,

and cases cited in the opinion. In the Sheip case the Court sustained an excise tax on the storage of gasoline, and the tax was sustained on three grounds: (1) That gasoline is highly inflamable and its storage needs to be regulated—hence a police regulation; (2) that the excise tax on the storage of gasoline, even for private uses, after having been brought into the State in interstate commerce, was necessary in order to equalize the burden between parties so storing gasoline, and others who buy gasoline in the open market, and accordingly pay the excise tax charged or collected by filling stations; (3) that the excise tax on the privilege of storing was applicable to all who might desire to store gasoline, without any geographical discrimination or otherwise. The Florida Statute imposing a gallonage tax

on the storage of gasoline was copied in South Carolina, and sustained in

Gregg Dyeing Company v. Query (S. C.)
164 S. E. 588, affirmed 286 U. S. 472.

A careful examination of the Florida Statute involved in the Sheip case, and a like examination of the South Carolina Statute *disclose no provision whatsoever for an increased ratio of storage fees dependent upon the number of places where storage was being made.* On the contrary, the fee chargeable was predicated upon the *amount* stored, regardless of the *number of places* where stored, either in the same county or in different counties.

We are wholly unable to see how counsel for appellees can sustain the contention of alleged "geographical uniformity" when the operation of the Act here involved upon Mr. Blume's business of 37 stores, all in Duval County, is compared with the operation of the Act upon the business of Winn & Lovett Grocery Company's 58 stores, situated in different counties of the State. As before noted, if the Winn & Lovett Grocery Company had 226 stores in different counties, it would be chargeable with an arbitrary state license tax, exclusive of the $3.00 per $1,000.00 on its stock, and exclusive of the municipal and county license tax, as required by Sec. 11 of the Act, of $42.76 per store on each of its stores operated in Duval County, as compared with $13.78 chargeable to Mr. Blume on each of his 37 stores operated in Duval County. If that be "geographical uniformity" we are unable to understand the meaning of the term.

It was also contended by counsel for the appellees that the State is not bound to tax all pursuits or businesses that might be legitimately taxed in order to sustain a particular license tax against one class of business, and such cases as

Southwestern Oil Co. v. State of Texas,
217 U. S. 114,

were cited to sustain that proposition. We readily concede the soundness of that proposition.
On the other hand it is equally well settled:

> "That the rights of all persons must rest upon the same rule under similar circumstances; . . . . . The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike . . . . . Mere difference is not enough; the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Louisville Gas & E. Co. v. Coleman,
277 U. S. 32, 37, 72 L. ed. 770, 774;
Frost v. Corporation Commission,
278 U. S. 515, 522, 73 L. ed. 483, 488.

No reasonable predicate can be found for the attempted sub-classifications created by sub-divisions (3), (5), (7), (9) and (11) of § 5 of the Florida Act. That attempted classification is a palpable attempt to prevent the invasion of new territory by persons already doing business in some other location, and to protect the so-called "independent" merchants from any added competition. Such attempted classification for such purposes, under the guise of a revenue measure, has been uniformly condemned.

Child Labor Tax Case, 258 U. S. 16, 37;
New State Ice Co. v. Liebmann, 52 S. Ct. 371,
76 L. ed. 747.

We, therefore, respectfully submit that the third and fifteenth assignments of error, R 172 and R 176, are severally well founded, and that the Florida Court erred in sustaining the validity of sub-sections (3), (5), (7), (9) and (11) of § 5 of the Act in question.

Before closing this branch of the discussion, it should also be noted that the journals of the Florida Legislature, in the First Extra Session of 1931, as noted in § IV. of the amended bill, R 7-8, show that the Legislature would never have adopted this Act without incorporating therein the arbitrary county line discriminations provided by sub-sections (3), (5), (7), (9) and (11) of § 5 of the Act. Such legislative journals are judicially noticed in Florida.

Amos v. Mosely, 74 Fla. 555, 77 So. 619.

The Bill as first passed by the House carried five

brackets similar to § 5 of the Indiana Statute (Jackson case, 38 Fed. (2) 654), but, as appears by the Senate Journal of June 23, 1931, page 2, those brackets of the House Bill were stricken out, and brackets 1 to 11, as now appear in § 5, were substituted, and the House afterwards concurred in that amendment. The Senate Journal of the regular session of May 30, 1931, shows that on that day Senate Bill No. 824 was introduced, but failed of passage because so near the end of the regular session. That Bill carried a section 5 almost word for word the same as section 5 of the Act passed at the First Extra Session. Hence it appears that the Senate was determined upon this County line discrimination, and, therefore, if the County line discrimination is void, then the whole Act must be declared a nullity, because the remainder would constitute a result not intended by the Legislature.

Williams v. Standard Oil Company,
278 U. S. 235, 73 L. ed. 287;
Smith v. Cahoon, 283 U. S. 553, 73 L. ed. 1264;
Grambling v. Maxwell, 52 Fed. (2) 256;
Ex Parte Smith, 100 Fla. 1, 128 So. 864.

Point 2.

CHAIN STORE WAREHOUSE DISCRIMINATION.—As Applied to the Factual Situation Presented by the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in Sustaining the Discrimination created by Secs. 8, 5 and 2 of the Act, imposing a License Tax of $3.00 per $1,000.00 of Value on Goods carried in

Warehouses of some of the Appellants, while Wholesale Merchants, though affiliated as Parts of "Voluntary Chains," remain subject to the old Law, requiring the payment of only $1.50 per $1,000.00 of Value on their Stocks—Contrary to the Due Process Clause and Equal Protection of Laws Clause of the 14th Amendment.

This Point is raised by sec. VII. (d) of the amended bill, R 16, and is in substance the fifth assignment of error, R 173. The clause "at retail," contained in Sec. 8 of the Act, defining a "store", operates to exclude wholesale merchants altogether from the operation of the Act. Nevertheless the last clause of Sec. 5 of the Act, requiring the payment of $3.00 per $1,000.00 on the value of stock carried "for sale in such store," and the provisions of Sec. 2, requiring the applicant for a license to show what merchandise is

> "held in storage to be sold in or through such store,"

operate to impose that $3.00 per $1,000.00 on stock in warehouses of chain store companies who have warehouses in the State, whereas wholesale merchants like Lewis-Chitty Consolidated Grocery Company, who perform the wholesale function for the "voluntary chains" such as "Better Food Stores," remain subject to Sec. 926 Revised General Statutes of Florida (Sec. 1197 Compiled Genl. Laws), providing for the payment of only $1.50 per $1,000.00 on stocks carried by such wholesale merchants. Section 1197 Compiled

General Laws of Florida, (§ 926 R. G. S.) provides, less the provisos, as follows:

> "**Merchants, etc.; Proviso.**—Merchants, druggists and storekeepers shall pay a license tax as follows:
>
> For the first one thousand dollars or fraction of one thousand dollars of stock of merchandise, three dollars in each county and for each place of business, and one and one-half dollars for each additional thousand or fraction thereof; but dealers in merchandise *at wholesale only*, shall pay a license tax of *one and one-half dollars* for each one thousand dollars of their stock of merchandise." (Italics ours.)

The provisions of the Act under attack show plainly that they were deliberately designed to discriminate against any chain store operator, such as the Winn & Lovett Grocery Company, who now operates, or who might undertake to operate, locally in this State, both retail chain store units and distributing warehouses.

The Bill, R 28, also shows that the Lewis-Chitty Consolidated Grocery Company is the largest wholesale grocery concern operating in Florida. Its principal place of business is in Jacksonville, but it has other warehouses or branches in other Florida cities, such as Orlando, Tampa, Miami, Cocoa, and at other points. It is also shown that it now affiliates with the "Voluntary Chain" of so-called "independent" retail grocery merchants operating under the group name of "Better Food Stores," and that it makes de-

liveries from its several warehouses to the so-called "independent" units in substantially the same manner as Winn & Lovett Grocery Company delivers from its distributing warehouses in Jacksonville and Sanford, Florida, to its retail Units. And yet, under the Act wholesale merchants such as the wholesale merchant above mentioned, continue to pay, as provided by § 1197 Compiled General Laws of Florida, only $1.50 per $1,000.00 license tax on their stocks of merchandise.

It is shown by Exhibit 3 to the amended bill, R 70-71, that there are in the City of Jacksonville alone sixteen wholesale grocers, one of whom is the Lewis-Chitty Consolidated Grocery Company, above mentioned. Each of those sixteen wholesale grocers enjoys the same discrimination of $1.50 per $1,000.00 on stocks carried.

Section IX. of the amended bill explains that the Act creates the same kind of discriminations in favor of McKesson & Robbins, Inc., now owning and operating the wholesale drug warehouses heretofore owned by the Groover Stewart Drug Company, at the principal distributing points in Florida, i. e., Jacksonville, Orlando, Tampa and Miami. This is another wholesale chain, affiliated with retail merchants in the territories of the respective warehouses, and yet the statute deliberately creates a discrimination by exempting such wholesalers and leaving them subject to the old Statute of $1.50 per $1,000.00 on stocks carried.

It is further pointed out in §§ IX. and XI. of the amended bill, R 22 and R 27, that these wholesale concerns serve their affiliated retail units by motor truck deliveries, upon telephone requisitions from the retail units, over the

paved highways, constructed by the State of Florida, radiating from each distributing center, in the same manner as the Winn & Lovett Grocery Company distributes its merchandise from its warehouse in Jacksonville to its retail units in Jacksonville and surrounding territory. Such wholesalers as the Lewis-Chitty Consolidated Grocery Company, and the other fifteen doing business in the City of Jacksonville, supply retail units in the same manner as does the Winn & Lovett Grocery Company, not only with respect to making deliveries by truck, as aforesaid, but also in the matter of purchasing their goods at original sources of supply, and in the matter of having them assembled in local warehouses for the purpose of distribution.

The Lewis-Chitty Consolidated Grocery Company, speaking as a part of the "Better Food Stores" group, says in the "Extra" of July 2, 1932, page 3, column 3, Appendix B to this brief (under separate cover):

> "Warehouses are operated at Jacksonville, Orlando, Tampa and Miami, and they serve a wide trade area. The stragetic location of these warehouses enable the stores to receive shipments promptly and economically. This is one of the big features of the Better Food Stores in that stores are not forced to purchase large stocks which remain on the shelves for a year or more, but can order small stocks frequently, thus enabling them to offer fresh merchandise at all times . . . Now they can get the same low price on a small order as they can on a half carload."

Such wholesalers have virtually become partners with the retail operators affiliated in such groups.

The primary purpose of the warehouses of the Winn & Lovett Grocery Company, and the primary purpose of the warehouses of the sixteen wholesale grocers in the City of Jacksonville is in each case to facilitate retail food distribution. Each enjoys the same privileges and the same benefits, and the same protection from the laws of the State of Florida. We therefore submit that no sound basis exists for the discrimination imposed by the Act now under attack.

The Indiana Statute, Sec. 8 (Jackson case, 38 Fed. (2) 654) applied to all stores

> "in which goods, wares or merchandise of any kind are sold *either at retail or wholesale.*" (Italics ours.)

As previously noted, Sec. 8 of the Florida Act confines its operation to places where sales are made *at retail.* That provision and the last clause of Sec. 5 of the Act, and the requirements of Sec. 2 of the Act, cause this discrimination to clearly differentiate the case at bar from the Indiana case on this point. Again, no such discrimination was found in the North Carolina case, affirmed by this Court.

There is a Virginia Statute which does place an excise tax on the storage of goods in warehouses intended for distribution to retail units owned by the owner of the warehouse, and the Virginia Statute has been sustained by the State Court of Virginia, and also by this Court. If the Florida Statute in this respect was the same as the Virginia

Statute, then we would not complain of any wholesaler discrimination. In

Commonwealth v. Bibee Grocery Co. Inc. (Va.)
151 S. E. 293,

the Virginia Court sustained the Virginia Statute, placing a license tax on goods carried in storage in warehouses of chain stores. In that particular case a small grocery chain store concern, operating seven retail grocery stores in Lynchburg and vicinity, was the complainant, and objected to the license tax upon its warehouse, operated in connection with its small chain of grocery stores. In justifying the tax, the State Court said:

> "It is unquestionably true that the maintenance and operation of a large distributing house in addition to operating seven retail stores imposes upon the commonwealth and the cities thereof a greater burden in fulfilling their obligations of protecting property rights, maintaining streets and highways, as well as furnish sewer and other sanitary conveniences."

But it did not appear from this State Court decision how the tax imposed upon chain store warehouses compared with that imposed upon the warehouses of wholesale grocery companies serving independent retail operators. That feature of the Virginia Statute was, however, made perfectly clear by the 3-Judge decision in the case of

Great Atlantic & Pacific Tea Co. v. Morrissett,
58 Fed. (2) 991.

It appeared in that case that the Great Atlantic & Pacific Tea Company operated in the State of Virginia 226 retail grocery stores; that 190 of the Virginia stores were served by a distributing warehouse located in the City of Richmond; that about 45% of the goods sold by it in its Virginia retail stores did not pass through its Richmond distributing warehouse, etc. The particular point here in question, however, is the amount of the tax imposed upon the warehouse. The Court, text 992, said:

> "In addition to the tax on retail stores, the State of Virginia also levies a license tax on wholesale stores, *equal in amount to that levied on distributing warehouses.*" (Italics ours.)

Injunction was sought against the enforcement of the Virginia license tax on the distributing warehouse, pursuant to sec. 188 of the Virginia Tax Code. In the case at bar the last sentence of Sec. 5 of the Florida Act, together with other related sections, previously mentioned, imposes a state license tax upon distributing warehouses of chain stores of *double* that imposed upon the warehouses of wholesalers. Suppose that the Winn & Lovett Grocery Company currently carries $100,000.00 of goods in its Jacksonville, Florida warehouse? In that case, it is required to pay a state license tax, under Sec. 5 of the Florida Act on those goods of $3,000.00. Suppose the stock carried by the Lewis-Chitty Consolidated Grocery Company in Jack-

sonville is equal in amount, and that is a fair assumption, because it is specially alleged in the bill that it is the largest wholesale grocer in the State. In that case the wholesale company, serving retail units affiliated in the "Better Food Stores" group, would pay $1.50 per $1,000.00 on its $100,000.00 stock, or $1500.00, exactly one-half of that chargeable to the Winn & Lovett Grocery Company. On top of that, the Winn & Lovett Grocery Company must pay $42.76 per store on its retail units if it operates as many as 226, those in Duval County and elsewhere, as compared with $5.00 per unit paid by independent retailers; and on top of both forms of state license tax, it must pay additional county license and municipal license fees, graduated as provided in Sec. 11 of the Act, yet to be considered.

The 3-Judge Court in the Morrissett case justified the Virginia Tax of *equal amount* by the following observations found in the opinion:

> "The respondents contend that a distributing house that distributes to 'stores' is in the same class as a wholesale house, and performs the same function; that a distributing warehouse requires the same use of the streets, the same fire and police, and other public service protection, and occupies the same general relation to the taxing power as a wholesale house. The respondents further contend that a retail store, owned and operated singly, when it sells its goods to the public sells them burdened with both the wholesale and retail tax, and that, where a number of stores are

> operated together, as here by the complainant, which virtually does its own wholesaling through its distributing house is properly classified and properly taxed as a wholesale house or warehouse. It is conceded that the tax imposed by the statute in question here is *equal* to the tax on a wholesale house . . . In the present case, in the light of these decisions of the Supreme Court, we are of the opinion that the classification made by the statute is a reasonable and not an arbitrary one. Certainly 'all persons similarly circumstanced' are treated alike . . . Every distributing house performs the function of a wholesale house, and to classify a distributing house with a wholesale house for the purpose of taxation certainly is reasonable and not arbitrary."

Such, then, is the decision which was affirmed by this Court, 284 U. S. 584, 585, 76 L. ed. 506.

If the Virginia Tax on distributing warehouses of chain stores located in that State had been *double* the excise or license tax imposed upon a regular wholesale house, then the tax could not possibly have been justified by the reasoning applied by the 3-Judge Court, or that applied by the State Court in the Bibee Grocery Company case, supra. The sole ground for upholding the tax was, in short, that the tax upon distributing warehouses was an "equalizer" of tax burdens, in order to make the tax upon retail distribution through chain stores equal to the combined bur-

den imposed upon regular wholesalers and that imposed upon their retail single unit customers.

The gasoline gallonage tax imposed upon the storage of gasoline by the Florida Statute, involved in Sheip v. Amos, 130 So. 699, supra, and imposed by the South Carolina Statute, involved in Gregg Dyeing Co. v. Query, 286 U. S. 472, was sustained on precisely the same ground, i. e. as an equalizing excise tax. But suppose that the gallonage tax on gasoline for the privilege of storing it for the purchaser's use had been *double* that imposed on gasoline ordinarily purchased through filling stations by other classes of users? Obviously such double imposition would have been an unsustainable discrimination.

It does not seem necessary to again review analogous cases for legal formulas that should apply to this form of discrimination. Sufficient formulas in that behalf may be drawn from the following decisions of this Court:

Louisville Gas and E. Co. v. Coleman,
277 U. S. 32;
Airway Elec. Corp. v. Day, 266 U. S. 71;
Smith v. Cahoon, 283 U. S. 553;
Southern R. Co. v. Greene, 216 U. S. 400, 417;
Cotting v. Kansas City Stock Yards Co.
183 U. S. 79;
Frost v. Corporation Commission, 278 U. S. 515.

In the Cotting case, 183 U. S. text 104, 105, this Court, among other things, said:

"The question thus presented is of the profound-

> est significance. Is it true in this country that one who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits? . . . The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron of this Court, when in Vanzant v. Waddel, 2 Yerger, 260, 270, he said:
>
> 'Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.' "

When the Florida Legislature deliberately imposed upon chain store warehouses *double* the excise tax which was to be paid by ordinary wholesalers upon goods carried in their warehouses, it becomes again perfectly apparent

that the "legislative scalping knife" was being applied to chain store retail distribution.

The amended bill, R 34, specifically alleged that the Legislature knew that "voluntary chains" were then operating in the State, such as "Independent Grocers Alliance" and "McKesson-Robbins, Inc." etc., and nevertheless deliberately created this discrimination against chain store warehouses, leaving the warehouses of wholesalers serving "voluntary chains" subject to the $1.50 per $1,000.00 under the old law. Such arbitrary and deliberate discrimination is not fair play, is not due process of law, and is not equal protection of the laws. In

Gregg Dyeing Company v. Query, 286 U. S. 472, 476, 480, 76 L. ed. 1232, 1236, 1238,

this Court adhered to the rule that a complementary excise tax, such as the gallonage tax on gasoline kept in storage, there involved, must be considered in connection with other tax burdens imposed by cognate statutes in order to test the question of substantial discrimination. The North Carolina Court did the same thing in the case of

Great Atlantic & Pacific Tea Co. v. Maxwell, 154 S. E. 838, affirmed 284 U. S. 575, 76 L. ed. 500.

To apply that rule in the case at bar, there is still no basis for doubling the excise tax on chain store distributing warehouses.

Section 1, Art. IX. of the Florida Constitution provides for a uniform and equal rate of ad valorem taxes on both

real and personal property. Sec. 5, Art. IX. of the Florida Constitution provides for authorizing counties and municipalities "to assess and impose" ad valorem taxes "upon the principles established for State taxation." In pursuance of those provisions of our Constitution, § 893 Compiled General Laws of Florida, 1927 (§ 695 R. G. S.) provides as follows:

> "893 (695) **Subjects of Taxation.**—All real and personal property in this State, and all personal property belonging to persons residing in this State, not hereby expressly exempted therefrom, shall be subject to taxation in the manner provided by law. (Ch. 4322, Acts 1895, § 1; Ch. 5596, Acts 1907, § 1)."

Section 896 Compiled General Laws of Florida, 1927, (§ 696 R. G. S.) provides in part as follows:

> "896 (696) **Personal Property Defined.**—The terms 'personal property' and 'personal estate' as used in this chapter, shall have the same meaning and shall, for the purpose of taxation, be construed to include all goods and chattels, moneys and effects, all boats and vessels, all debts due or to become due from solvent debtors, whether on account, contract, note, or otherwise, all public stocks or shares in all incorporated or unincorporated companies."

Other sections of the Florida Statute provide the necessary machinery for assessing, levying and collecting

ad valorem taxes on all real and personal property for State, county and municipal purposes. It follows that all the goods, chattels, moneys, debts due, notes held, or other personal property, tangible and intangible, owned by appellants severally within the State of Florida, are subject to ad valorem state, county and municipal taxes. It is impossible, therefore, to sustain the $3.00 per $1,000 chain store warehouse tax as an "equalizer" of tax burdens.

It is true that some of the appellants maintain no warehouses in Florida, but do maintain warehouses in other States. Other appellants maintain no warehouse at any place. Nevertheless, this is a several appeal, and hence those injured by the warehouse tax, severally, have the right to complain. The Liggett Company has a central warehouse in New York City, R 20, but none in Florida. Obviously, it is not subject to the excise tax of $3.00 per $1,000.00 on goods carried in that warehouse. The State of New York can, and presumably does, levy adequate taxes for the protection it affords to that warehouse.

The same situation is true of the appellant Montgomery Ward & Company, with its headquarters and warehouse in Chicago, R 92.

Other appellants besides Winn & Lovett Grocery Company do operate warehouses in Florida. The appellants Southern Stores Corporation and South Florida Stores Corporation maintain warehouses in Miami, West Palm Beach and Tampa, R 98-99. Paxson's Inc. operating 8 small shoe stores, seven in Florida and one in Georgia, operates no warehouse anywhere, but gets its stock direct from the factories operated in other States, just as do its single store and chain store competitors, R 35 to 37. The appellants

Melville Shoe Corporation and G. R. Kinney Company are two of its chain store competitors. They both operate as Paxson's Inc. operates—without any warehouse, R 90-91.

It is thus seen that the appellants who conduct grocery chain store units in Florida are the ones entitled to complain of this warehouse discrimination. As to them, the discrimination, it seems to us, is indefensible.

Point 3.

COUNTY AND MUNICIPAL LICENSE DISCRIMINATIONS. — As Applied to the Factual Situation Presented, the Supreme Court of Florida erred in sustaining the Validity of Section 11 of said Act, imposing Cumulative, Discriminatory County License Taxes, and Authorizing Discriminatory Municipal License Taxes—Contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment.

This Point is raised by § VII. (c) of the amended bill, R 16, and is in substance the fourth assignment of error, R 173.

We have grouped the objection as to the county license tax and the municipal license tax under one Point because the method of arriving at each under the provisions of § 11 of the Act is the same, so that the county license tax and the municipal license tax will stand or fall together. Nevertheless, for the sake of clarity, we shall discuss them separately.

(1) *County License Discrimination.*

As to County Licenses, section 11 of the Act provides, among other things, as follows:

> "A county license tax of twenty-five per cent of the State license tax shall be levied and imposed upon each store as here defined . . . provided that the tax levied by or for the several counties . . . shall be graduated only on the number of stores situate in such county . . . respectively, notwithstanding the applicant may own other stores beyond the limits of such County."

The phrase "State license tax," embodied in this section, has the effect of including as a part of the County license tax 25% of the arbitrary bracket license fees provided for by sub-sections (1), (2), (4), (6), (8) and (10) of section 5 of the Act, as applied to all stores in a particular county, plus 25% of the $3.00 per $1,000.00 on stocks carried in retail units, and warehouse, if there be any, in the same particular county.

The operation and effect of § 11 as to County licenses may be illustrated by the business of the appellant, Winn & Lovett Grocery Company. It appears by § III. of the amended bill, R 4, that Winn & Lovett Grocery Company owns and operates 23 of its retail units in Duval County. Hence to arrive at 25% of the bracket license fees prescribed by sub-sections (1), (2), and (4) of § 5 of the Act, we get the following table:

TABLE 5—(County License)

1 Store		$ 5.00
14 Stores at $10.00		140.00
8 Stores at $15.00		120.00
23 Stores, total		$265.00
25%	$66.25	

To this we must add 25% of the license tax on stocks carried in the retail units and Jacksonville warehouse of this appellant. The value of those stocks is not alleged in the amended bill, but we may safely assume that each retail store carries an average stock of the value of $2,000.00; and we may assume that its principal Jacksonville warehouse, serving the majority of the Company's fifty-eight retail units, carries an average stock of the value of $75,000.00—making a combined value for the warehouse stock and 23 retail store stocks of $121,000.00. This at $3.00 per $1,000.00 gives the sum of $363.00, 25% of which is $90.75. That amount added to $66.25, above shown, gives a total County license tax for Duval County upon the business of Winn & Lovett Grocery Company of $157.00. Of this amount $56.25 results from the 25% of the $3.00 per $1,000.00 on the stock carried in the warehouse.

It is thus seen that the County license tax provided for in § 11 of the Act, is constructed on the same plan as the two State license taxes, and that the discrimination created thereby is cumulative—the greater the number of stores the greater the discrimination.

The same authorities which condemn the State license tax on chain store distributing warehouses, discussed under

Point 2 supra, likewise condemn the County license tax, because the 25% County license tax is precisely the same kind of discrimination. At least that is true as to the appellant Winn & Lovett Grocery Company with respect to its business in Duval County.

The State bracket license fees prescribed by sub-sections (1), (2), (4), (6), (8) and (10) of § 5 of the Act, stand upon somewhat different footing from the different County license fees discussed under Point 1, supra, but we shall present a full discussion of such single County graduated State and County license fees under Point 7 of the argument, later to be taken up.

(2) *Authorized Municipal License Tax.*

Section 11 of the Act, in prescribing a municipal license tax, does so in precisely the same terms as regards the County license tax, except that as to the latter the Act is mandatory, and as to the former, permissive. The language is

> "Each incorporated municipality of the State of Florida is *authorized* to levy a municipal tax of twenty-five per cent of the State tax imposed by this Act."

Other provisions of the section require that in measuring such authorized municipal license tax by the standards fixed for State license taxes, only the stores in each particular municipality,—and that would include a distributing warehouse, if there was one,—must be taken into account.

The statutes of the State of Florida, sections 2935 to 3141, Compiled General Laws, 1927 (§§ 1825 to 1985 R. G. S. 1929), provide a general law for the organization and government of cities and towns. Any city or town of the State operating under such general law would be authorized to apply the 25% license taxes prescribed by § 11 of the Act under attack. But it so happens that very few cities and towns of the State of Florida, especially of the larger ones, operate under the general law. Nearly all of the important cities and towns of the State operate under special legislative charters, granted pursuant to § 8, art. VIII. of the Florida Constitution, which provides:

> "The Legislature shall have the power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter and amend the same at any time."

Under that Constitutional provision it is usual for the charters of cities and towns of the State, operating under special charters, to carry provisions with respect to license taxes, similar to the following:

> "To license privileges, business, occupations and professions carried on or engaged in within the city limits, and the amounts of such licenses and the amount of such license taxes shall be fixed by city ordinance, which amounts of said taxes shall not be dependent upon a general state revenue law."

Such a provision is embodied in the charter of the City of Miami, as shown by the case of

State v. Dillon, 75 Fla. 785, 79 So. 29.

Section 5, Art. IX. of the Florida Constitution authorizes the Legislature to delegate to municipalities the power to levy ad valorem taxes and taxes upon licenses and privileges; and the Supreme Court of Florida has held that a Municipality, in exercising the power so delegated, must be guided by the principles applicable to State taxation.

Ellis v. ACL R. Co. 68 Fla. 160, 66 So. 1005.

To apply the latitude thus given by the Florida Constitutional provisions applicable to municipalities, and the powers given by special charters, every municipality operating under such special charter may adopt the "principle" of a graduated license tax upon retail merchants, such as defined by § 5 of this Act, but can, by Ordinance, fix the *amounts* very much greater. And, therefore, if the Florida Supreme Court's decision remains unchanged every municipality in the State operating under a special charter may fix a schedule of licenses chargeable to multiple store operators, starting with, say $10.00 for a single store, and double the amount for each additional store, and we would then have the following result, say up to ten stores:

TABLE 6—(Authorized Municipal License)

1st Store	$ 10.00
2nd Store	20.00
3rd Store	40.00
4th Store	80.00
5th Store	160.00
6th Store	320.00
7th Store	640.00
8th Store	1280.00
9th Store	2560.00
10th Store	5120.00
10 Stores, total	$10230.00
Average per Store	$1023.00

Such action by Florida Municipalities is not mere speculation. On the 28th day of September, 1932, the City of West Palm Beach adopted a general occupational license tax Ordinance, containing the following provision as to merchants:

"Merchants, retail, (provided license shall permit but one location) when the average value of stocks of goods carried are as follows:

Not exceeding $1,000.00	$10.00
More than $1,000. for each additional $1,000. or fraction thereof	1.50

Where more than one store is owned or operated in said City, by the same person, company, corporation or partnership, there shall

> be charged in addition to the foregoing sum $25.00 for the second such store, $50.00 for the third such store and $50.00 each for all stores in excess of three."

This is, therefore, a concrete example of what such Cities of the State of Florida may do where operating under special charters. A certified copy of the material portions of the West Palm Beach Ordinance is shown by Appendix C to this brief.

We are informed that the Cities of Maplewood, Missouri, and Hamtramck, Michigan, have adopted licenses of $1,000.00 for every multiple store, and the City of St. Louis imposes licenses up to $250.00 for each multiple store in excess of twenty-five, and that suits are now pending in those jurisdictions to test the validity of ordinances prescribing said license taxes.

With such authority vested in the hands of all Florida municipalities, the following observations from

Cooley on Taxation, 4th ed. Vol. 1, § 259,
become quite pertinent:

> "If the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies."

Again, this Court's reasoning in the case of

Cotting v. Kansas City Stock Yards Co. 183 U. S.

text 112, applies, i. e.:

> "If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made."

No municipality was made a defendant in this case because none had acted adversely at the time this suit was filed, but if the decision of the Supreme Court of Florida is sustained it will be an easy matter for municipalities of the State, acting under such Ordinances as that of West Palm Beach, to add such burdens to the arbitrary State license taxes as will completely destroy all chain store distribution within the State. Such authorized and potential municipal license taxes as above suggested, would easily exterminate the business of Winn & Lovett Grocery Company, operating 23 retail stores in the City of Jacksonville; and also exterminate the "Whiddon Stores," operating 37 retail stores in the City of Jacksonville.

No such cumulative discriminations for county license taxes and municipal license taxes, pyramided on a double

form of State license tax, were involved in the Indiana chain store case, or any other chain store case reviewed by this Court.

As said by Mr. Chief Justice TAFT in the Child Labor Tax Case: The

> "prohibitory and regulatory effect and purpose (of the Florida Act) are palpable."

The provisions of section 11 and the provisions of section 5 of the Act under attack, are

> "clear and hostile discriminations"

against all chain store retail distribution.

The framers of the Florida Act were not content to adopt the single scheme of a graduated license tax upon chain stores, as defined by the five brackets of section 5 of the Indiana Statute, but, as we have seen, they added to and multiplied the discriminations—different County Discrimination, the warehouse discrimination, County License discrimination, and Municipal License Discrimination. It thus becomes very plain that the Florida Legislature did not intend to permit the survival of chain store retail distribution in this State.

In the case of

> People v. Gillson, 109 N. Y. 399, 17 N. E. 343 (1888)

Judge PECKHAM, afterwards a Justice of this Court, aptly

described the obvious purpose and effect of the Florida Act, in the following language:

> "It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community, against the fair, free and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition and therefore flying to the Legislature to secure some enactment which will operate favorably to them, or unfavorably to their competitors."

The same doctrine was reaffirmed and again applied by the New York Court in the case of

People v. Jenkins (N. Y.) 94 N. E. 1065.

In the case of

Liggett Company v. Baldridge, 278 U. S. 105, 113,

this Court said:

> "A state cannot, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

Point 4.

ARBITRARY ADMINISTRATION OF THE ACT.—The Supreme Court of Florida erred in Sustaining the Comptroller's Arbitrary and Discriminatory Administration of the Act, whereby he undertook to Exempt Furniture Dealers, Filling Stations that sell Tires and Tubes, Automobile Dealers, Cigar Stores, Restaurants, and other Classes of Store Operators, regardless of whether Single Store Operators or Chain Store Operators —Contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment.

This is a re-statement of the eighth assignment of error, R 174.

The record, page 1, shows that the original bill was filed September 30, 1931. After that date and prior to the filing of the amended bill on November 12, 1931, appellants learned that the appellee Comptroller, in the administration of the Act, was undertaking to create many exemptions not provided for by the Act itself. The amended bill, sections XV and XVI, R 49 and R 53, show that the appellee Comptroller has undertaken to exempt furniture dealers, filling stations that sell tires and tubes, automobile dealers, cigar stores, restaurants and sundry other classes of store operators, regardless of whether single store operators or chain store operators, and that in doing so he has created additional arbitrary and unreasonable discriminations against appellants severally.

The same matter was again sharply brought to the

attention of the Supreme Court of Florida by section 10 of the petition for rehearing, R 157 to 158. Appellants there pointed out what we believe are erroneous conclusions stated in the concurring opinion of Mr. Justice Davis, R 121-122, also 141 Sou. 160, bottom of second column and 161, first column.

As to furniture dealers, the affidavit of G. D. Wood, R 78 to 79, shows that his furniture company, Independent Furniture Company, with a small capital stock of less than $25,000.00 understood that a chain furniture dealer such as his company would be subject to the terms of the Chain Store Act. Accordingly his company prepared a petition of intervention for filing in this suit and draft thereof was attached to his affidavit and appears R 79. Afterwards the said Wood was informed that the Comptroller under the advice of the Attorney General had construed the Act not to apply to furniture dealers, notwithstanding the express definition of the term "store" found in Sec. 8 of the Act and also in Sections 1 and 2 of the Act, and that the Comptroller had ruled that Section 893 Revised General Statutes of Florida (Section 1149 Compiled General Laws, 1927) would apply to furniture dealers instead of the Chain Store Act, regardless of whether such furniture dealers operated chains of stores or otherwise. The ruling of the Comptroller in that behalf is shown by a letter embodied in section XV of the amended bill, R 50, dated October 27, 1931, addressed to all Tax Collectors of the State. In that letter he first announces that the Act here under attack repeals Section 1197 of the existing license tax laws only as to retail stores and left in force the provisions thereof applicable to wholesale stores as previously dis-

cussed. The second paragraph of the letter relative to Section 1149 of the prior law is confusing because the word "necessary" is used, whereas the context plainly indicates that the Comptroller intended to use and doubtless did use the word "unnecessary" and that the mistake occurred in making copy. This is made clear by the affidavit of G. D. Wood, R 78, showing that after the preparation of his petition of intervention, the Tax Collector of Duval County accepted the payment of license fees on the basis of the old License Act. Section 1149 Compiled General Laws relating to furniture dealers provides in part:

> "Dealers in Furniture . . . . With capital stock less than $25,000.00 shall pay a license tax of $10.00."

and so $10.00 is what the Independent Furniture Company, represented by G. D. Wood, paid, pursuant to the old law as ruled by the Comptroller in his letter of instructions to the several tax collectors of the state.

As to dealers in cigars and tobacco, Section 1120 Compiled General Laws (864 RGS) provides as follows:

> "Cigars and Tobacco—Dealers in cigars and tobacco, who pay no other license, shall pay a license of $5.00."

Upon the same theory as alleged in the amended bill the Comptroller is exempting dealers in cigars and tobacco from the operation of the Chain Store Act, regardless of whether such dealers operate single stores or many stores in the

same county or in different counties.

It so happens that one of the appellants, United Cigar Stores Company, deals in cigars and tobaccos, through a chain of stores operated in Florida and other states, but in such stores they sell other things besides cigars and tobaccos, namely, pipes and other accessories ordinarily purchased by users of tobacco; soft drinks, chewing gum, toilet articles and many other items. On this account, appellant, United Cigar Stores Company, gets no protection from the administration of the Act now being applied by the Comptroller; on the contrary its competitors dealing only in cigars and tobaccos are being exempted by the Comptroller under Section 1120 Compiled General Laws in the manner aforesaid.

The appellant, Liggett Company, also sells cigars and tobaccos, cigarettes, etc., in each of its twenty-two retail drug stores operated in different counties of Florida. Nevertheless it is being subjected to pyramided license taxes provided for in sections 5 and 11 of the Chain Store Act, while its competitors, selling cigars and tobaccos only, are not subjected to any such scheme of tax burdens.

So again, Section 1168 Compiled General Laws, 1927 provides:

> "1168 (897.) *Green groceries, fruits.* Green grocers and dealers in fresh fruits and nuts, paying no other licenses, shall pay a license tax of three dollars."

The Comptroller's administration of the Chain Store Act now complained of in sections XV and XVI of the amended bill means that he in like manner is exempting dealers in green groceries and dealers in fresh fruits and nuts, regardless of whether such dealers operate one place of business or a chain of such places of business, either in a single county or in different counties. Four of the appellants operate retail grocery stores in different counties of the State of Florida. A large part of the stock carried in each such retail grocery store by each such appellant consists of green groceries and fresh fruits and nuts. Yet, their competitors dealing only in green groceries and fruits and nuts are not being subjected to the several forms of discriminatory license taxes provided for by sections 5 and 11 of the Chain Store Act.

Again, Section 1236 Compiled General Laws, 1927, as to cafes and restaurants, provides as follows:

> "1236 (964.) *Restaurants, cafes, etc.*—Owners or managers of restaurants, cafes and public eating saloons shall pay a license tax as follows:
> With seats or accommodations for fifteen or more persons, shall pay a license tax of ten dollars.
> With seats or accommodations for less than fifteen persons, shall pay a license tax of five dollars."

The definition of "store" contained in Sec. 8 of the Act of 1931 very clearly embraces such places of business, because restaurants sell not only food that is cooked and

served but they sell fresh fruit and ordinarily cigars, tobaccos, chewing gum and the like. It cannot be denied that they sell "goods, wares or merchandise", and yet the Comptroller is exempting restaurants and cafe dealers from the arbitrary license fees provided for by the Act of 1931 holding that the section of the old statute last above quoted remains applicable, and no other, regardless of whether the restaurant operator owns one restaurant or a chain of restaurants. The amended bill particularly mentions the fact that in the City of Jacksonville there are several chains of "Pig Stands." The amended bill shows, and for that matter it is common knowledge that drug stores serve sandwiches, milk, ice cream and lunches so that the business of restaurants and cafes come in direct competition with the business of drug stores such as those operated by the Liggett Company in Florida, and yet this bracketed scheme of license taxes, by the administration of the Comptroller, is not being applied to restaurant chains, cafe chains or pig stand chains.

Again Sec. XV. of the amended bill, R 51, shows that section 1061 Compiled General Laws, provides a graduated tax for tire and tube dealers depending upon the population of the towns or cities where such dealers do business, and that the Comptroller, acting on the advice of the Attorney General, has assumed to exempt tire and tube dealers though no such exemption is found in the Chain Store Act under attack. It is on the same page shown that the Standard Oil Company operates a chain of several hundred filling stations in the State of Florida and sells through them not only gasoline and other petroleum products, but also automobile tires and tubes, and it is then

alleged that because that company sells tires and tubes in connection with gasoline and other petroleum products, the Comptroller on account of Section 1061 Compiled General Laws has undertaken to exempt the Standard Oil Company from the operation of the Chain Store License Act.

The daily journals of the Florida House of Representatives at the first extra session of 1931 show that when the Committee Substitute for House Bill No. 8-X was pending in the House, as appears by the house journal of June 19, 1931, pages 26-27, Representative Lewis of Gulf County offered the following amendment to be added at the end of section 8 of the Bill.

> "Provided, however, the term 'store' shall not apply to or be construed to mean or include any store *primarily* operated for the sale of gasoline or other petroleum products."

This was alleged in the amended bill, bottom R. 51. In lieu of that proposed amendment a substitute amendment was offered creating the proviso which is now found at the end of Sec. 8 of the Act, and the amendment, so adopted specifically confines the exemption to filling stations engaged *exclusively* in the sale of gasoline and other petroleum products.

It therefore appears that the Comptroller in his administration of the Act is attempting to do what was provided for by the Lewis amendment, rejected by the Legislature.

It is contended by the appellants severally that the Comptroller's administration of the Chain Store Act in the

several particulars mentioned is wholly unjustified. No such exemptions were contained in the Act itself and if they had been, such exemptions would furnish additional reasons for the invalidity of the Act.

If the ascending bracket scheme of Section 5 of the Act is just and reasonable, first for single counties and second for different counties, when applied to chain store owners operating *grocery* stores or operating *drug* stores or operating *shoe* stores, then why should these classes of merchants be singled out and many other merchants doing business in the same way be exempted by the State Comptroller charged with the administration of the Act?

Such discriminatory administration of a state law by a state official, particularly by an administrative officer such as the State Comptroller in this case, has been uniformly condemned by the decisions of this Court.

Yick Wo. v. Hopkins, 118 U. S. 356;
C. B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234;
Home Telephone & Tel. Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510;
Harkness v. Irion, 278 U. S. 92, 73 L. Ed. 198;
Iowa-Des Moines Natl. Bank v. Bennett, 284 U. S. 239, 76 L. Ed. 265.

In the Bennett case, the Court, speaking through Mr. Justice BRANDEIS, 284 U. S. text 247, said:

> "The right invoked is that to equal treatment; that such treatment will be attained if either their competitors' taxes are increased or their own

reduced. But it is well settled that a tax-payer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. Cumberland Coal Co. v. Board of Revision, supra; Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 514-518; Chicago Great Western Ry. Co. v. Kendall, 266 U. S. 94, 98; Sioux City Bridge Co. v. Dakota County, supra. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. Montana Natl. Bank v. Yellowstone County, supra."

Point 5.

ACT VOID IN ITS ENTIRETY.—AS Applied to the Factual Situation Presented by the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in sustaining Chapter 15624 in its Entirety.

This is a re-statement of the 1st, 10th, 11th and 12th assignments of error, R 172 and R 175. The amended bill in this case attacks sundry provisions of Sections 5 and 11 of the Act separately and then attacks the Act as a whole. The County line discriminations discussed under Point 1, supra, the chain store warehouse discrimination discussed under Point 2, supra, and the County license and

Municipal license discriminations discussed under Point 3 supra, are sufficient of themselves to destroy sections 5 and 11 of the Act. Those two sections are the operative parts of the Act and if they are eliminated the remainder will constitute a result never intended by the Legislature. Indeed no such Act, as would be constituted by the remainder, would ever have been enacted, and hence the invalidity of section 5 alone would destroy the Act in its entirety.

Williams v. Standard Oil Company, 278 U. S. 235;
Frost v. Corporation Commission, 278 U. S. 515, 9 h. n.;
Smith v. Cahoon, 283 U. S. 553;
Grambling v. Maxwell, 52 Fed. (2) 256;
Ex Parte Smith, 100 Fla. 1, 128 So. 864.

The objections heretofore discussed under Points 1, 2 and 3 have been predicated upon the due process clause and the equal protection of the laws clause of the 14th Amendment. We propose next under Point 6 to point out the invalidity of the Act because in derogation of the commerce clause, Sec. 8, Art. I of the Federal Constitution, and the equal privileges and immunities clause of Sec. 2, Art. IV of the Constitution. If Point 6 is sustainable the same constitutes an additional reason why the Act under attack is void in its entirety.

Point 6.

COMMERCE CLAUSE AND EQUAL PRIVILEGES CLAUSE VIOLATED.—As applied to the Factual Situation Presented, the Supreme Court of Florida erred in sustaining the Validity of said Act as against the Objections that the same Operates to burden Interstate Commerce conducted by Appellants Severally, and operates to deprive Appellants Severally of the same Privileges and Immunities enjoyed by Citizens of the State of Florida—Contrary to the Commerce Clause, § 8, Art. I., and contrary to the Equal Privileges and Immunities Clause, § 2, Art. IV. of the Federal Constitution.

This is substantially the seventh assignment of error, R 174. This proposition embraces two questions: (1) burden upon interstate commerce conducted by appellants severally, contrary to the Commerce Clause, § 8, Art. 1. of the Federal Constitution; and (2) a deprivation of equal privileges and immunities of citizens of the several States, contrary to § 2, Art. IV. of the Constitution. These two questions are urged in sundry paragraphs of the amended bill and petitions of intervention. For example, § VIII. of the amended bill, R 19, and § XVII. of the amended bill, R 54. In § XVII. of the amended bill, beginning R 54, it is pointed out that the appellant Louis K. Liggett Company supplies its retail store units in Florida and in other States upon requisitions received from its several store managers, for periodical shipments, either weekly or twice a month, from its central warehouse in New York City, or from fac-

tories with which prior contracts have been made by it, in contemplation of such periodical shipments.

> "That the making of contracts with the factories for such supplies and shipments, the transmission of orders from store managers and the making and transportation of orders from the store managers and the making and transportation of such regular periodical shipments, all and singular, constitute interstate commerce. That in order to keep fresh drugs and medicines on hand in such retail store units and prevent accumulation of old stock it is necessary to make frequent shipments as aforesaid from fresh sources of supply. That frequent shipments as aforesaid aid your complainant in securing a rapid turn over in said retail units."

It is next pointed out that appellant, Winn & Lovett Grocery Company, and appellant, Paxson's Inc., conduct their several businesses in substantially the same manner, except that Winn & Lovett Grocery Company has local warehouses in Florida, for purposes of local distribution, and that Paxson's Inc. has no warehouse, but causes periodical shipments to be made direct from factories. It is next alleged, R. 55:

> "That the Legislature, being so informed, designedly undertook by the oppressive, arbitrary and excessive license fees called for by said

> Act to burden the interstate characteristics of your orators' several businesses as aforesaid. That the Commerce Clause of the Federal Constitution entitled your orators to carry on the interstate features of their several businesses without hindrance and without such burdens as are attempted to be imposed by said Act."

The petition of intervention by the Nunnally Company, another appellant, R 85, among other things, alleges:

> "That in order to keep its stocks of candies, etc., carried in its said Florida retail stores fresh and attractive to the retail trade petitioner makes frequent interstate shipments to said stores from its Georgia factory upon periodical interstate requisitions therefor, sent by mail, wire or telephone, from petitioner's managers of said Florida stores."

The averments of the amended bill, and of these several petitions of intervention, were likewise admitted by the motion to dismiss.

As supporting data, we call the Court's attention to one of the reports made by the Federal Trade Commission to the United States Senate, pursuant to the Brookhart Resolution, No. 224, of the 70th Congress, now known as

Senate Document No. 30, 72nd Congress, First Session. The title of that report is:

"Sources of Chain Store Merchandise."

Such official sources of information are judicially noticed by this Court.

Atchison, Topeka, Etc. R. Co. v. U. S. 284 U. S. 248, 260, 76 L. ed. 273, 280, footnotes 7 and 8;

Standard Oil Company v. U. S. 283 U. S. 163, 171, 172, 176, 177 and 178—foot notes 5, 6, 10, 11, 14, 16 and 17.

The first paragraph of the letter of submittal also says:

"There are essential differences among chains in various lines of business, as well as within the same line, in the extent to which they undertake to buy goods direct from manufacturers and perform the wholesaling operations for themselves."

A further part of the letter of submittal says:

"Chains in different lines of business show marked differences in sources patronized."

Sundry sources of supply are then mentioned.

The letter next points out differences in purchasing practices of different chains, and, finally, sources of supply of specified commodities.

The first section of the report itself, page 1, among other things, says:

> "Because chain-store systems undertake to a greater or less degree to purchase goods direct from manufacturers and other producers and to perform for themselves the *wholesale assembling and distributing operations which are essential to their functioning as retailers,* it was deemed essential to inquire into the extent to which they purchase their goods from these direct sources as compared with the extent of their purchasing through wholesalers and other types of middlemen. . . . . In so far as they purchase directly from manufacturers, they must undertake *to perform for themselves and bear the cost of the wholesale assembling and distributing of the goods.* (Italics ours)

It is thus found by the Federal Trade Commission that the wholesale assembling and distributing operations of chain stores, such as the appellants

> "are essential to their functioning as retailers."

In short, they could not operate their retail units in the State of Florida as parts of their chain store enterprises, if their "wholesale assembling and distributing operations" in interstate commerce were eliminated.

It is thus made to appear that the operation of a national chain-store enterprise must be regarded as a national unit, of which the retail stores in any particular State, such as Florida, constitute only a part. A mere selling of groceries, drugs, shoes, wearing apparel, or other merchandise, across the counter in a retail store, as an intrastate transaction, is only one of the steps which a chain-store merchant necessarily takes in the process of distribution from the producer to the consumer. He must first buy, or make contracts to buy, the commodities at points of production. He must next arrange for their transportation; next procure their assembling at a convenient point of distribution; next receive requisitions sent in interstate commerce for periodical shipments to the retail units in Florida and elsewhere; next, shipments must be sent in pursuance of such requisitions; next reports must be maintained through interstate commerce in order for the head office to keep in touch with turn-over.

In the case of

Gibbons vs. Ogden, 9 Wheat. 1, 229, Mr. Justice JOHNSON concurring, said:

> "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, be-

> come commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation."

On page 231, he further said:

> "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

This definition of what constitutes "commerce" and the purpose of the Commerce Clause have been repeatedly applied by this Court. The definition just quoted shows beyond any doubt that many functions performed by the appellants in operating their chain store enterprises are interstate commerce, without which they could not operate their retail units as parts of such enterprises. In the case of

Minnesota vs. Barber, 136 U. S. 313,

the Court held, as stated in the last headnote:

> "A burden imposed upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting it."

To be sure the record at bar shows that the ascending brackets of this Act apply to those engaged in intrastate commerce as well as those engaged in interstate commerce, and applies to domestic chain store owners as well as foreign corporations operating in Florida. Nevertheless the record shows that the Florida Chain Store Act was directed chiefly against the operations of the so-called "big chains" all of whom are non-resident corporations with their central offices located in New York City, Chicago, and elsewhere.

In the case of

Caldwell v. North Carolina, 187 U. S. 626-627, we find a statement which we think precisely fits the point now under discussion. It is there said:

> "This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens we are brought back to the condition of things which existed before the adoption of the Con-

> stitution, and which was one of the principal causes which led to it."

In Shafer v. Farmers Grain Company, 268 U. S. 189, 198, 69 L. Ed. 909, 914,

it is said:

> "Buying for shipment, and shipping to markets in other states, when conducted as before shown, constitutes interstate commerce—the buying being as much a part of it as the shipping."

This definition is certainly applicable to many of the appellants, which must necessarily buy supplies in all parts of the United States in order to keep the current of food products and other commodities handled by them severally, circulating for distribution in their retail units located in Florida and in other states.

In the case of

Furst v. Brewster, 282 U. S. 493, 75 L. Ed. 478, the Court among other things said:

> "Commerce comprehends all the component parts of commercial intercourse between different states, and according to established principle, any State statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void."

Like principles were cited in

Ozark Pipe Line Company v. Monier, 266 U. S. text 265,

where the Court said:

"The protection against imposition of burdens upon interstate commerce in practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."

In Federal Trade Commission v. Pacific States P. T. Assn. 273 U. S. 52, 71 L. Ed. 535,

the Court held as stated in the fifth headnote (L. Ed.) as follows:

"Interstate commerce is not confined to transportation, but comprehends all commercial intercourse between different States, and all component parts of such intercourse, including the buying and selling of commodities for shipment from one state to another."

In Airway Electric Corporation v. Day, 266 U. S. 71, 69 L. Ed. 169,

it is pointed out that if any part of the taxing act of a State in the nature of an excise tax burdens interstate

commerce, or an *integral part* of a business constituting interstate commerce, the tax is void and must be condemned.

The same doctrine was laid down in the case of

Sprout v. City of South Bend, 277 U. S. 163, 72 L. Ed. 833,

opinion by Mr. Justice BRANDEIS, the eighth headnote of which reads as follows:

> "To sustain an occupation tax on one engaged in intra and interstate business *it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased on account of the interstate business done;* that one engaged exclusively in interstate business will not be subject to the imposition; and that persons taxed could discontinue the intrastate business *without withdrawing also from the interstate business.* (Italics ours)

To like effect is

East Ohio Gas Company v. Tax Commission of Ohio, 283 U. S. 465, 75 L. Ed. 1171, 3 h. n. L. Ed.

opinion by Mr. Justice BUTLER.

When the doctrines of these cases are applied to the Florida Act, as it affects and operates upon the businesses of appellants severally, the Act must fail.

In analyzing the many discriminations created by the Florida Act. and in pointing out its palpable object and purpose, as manifested by its operation and effect, it has been made clear that the discriminatory license fees were not imposed

"solely on account of the intrastate business."

On the contrary that the "amount exacted" was

"increased on account of the interstate business done."

It would be impossible to operate a national chain store enterprise, such as operated by several of the appellants, and divorce the interstate functions thereof—buying, assembling, distributing, etc.—from the intrastate functions thereof—the actual retailing in the retail units of the several states. See Senate Document No. 30, 72nd Congress, 1st Session, Section 1, p 1, quoted p 76 supra; also Section 7 of said Document pages 22 to 27.

We submit, therefore, that there is no escape from the application of the principles stated in the eighth headnote of the Sprout case, supra.

The purpose of the equal privileges and immunities clause of Sec. 2, Art. IV of the Constitution was closely akin to that of the commerce clause. In the case of

Ward v. Maryland, 12 Wall. 418, 430-431,

the Court held void a discrimination against non-resident

traders as being in violation of the equal privileges and immunities clause. In support of the holding the Court said:

> "Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system."

In the case of

> Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 70, 64 L. Ed. 460, 469,

the Court said:

> "A general taxing scheme such as the one under consideration, if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other states; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled."

The record at bar shows that the Act under attack, in undertaking to discriminate against all chain store operators necessarily is chiefly directed against the non-resi-

dent appellants, just as was the case with the North Carolina statute in the case of

Bethlehem Motors Co. v. Flynt, 256 U. S. 421.

The foregoing propositions as to burden upon the interstate activities of the appellants severally and as to depriving them of the equal privileges and immunities of citizens of the several states, have not heretofore been presented to this Court in any chain store case. In the Indiana case the complainant owned and operated all of his business, wholesale and retail, within the City of Indianapolis. The case was deemed a class suit, nevertheless neither the record nor the briefs presented in that case urged either of these propositions. The same may be said of the North Carolina case, although some of the appellants here were appellants in that suit.

We submit, therefore, that independent of the due process clause and equal protection of the laws clause of the 14th Amendment, the commerce clause and the equal privileges clause strike down those provisions of the Florida Act which undertake to impose a greater proportion of burdens upon appellants severally than it does upon so-called independent merchants of that state.

Point 7.

SINGLE COUNTY STATE LICENSE DISCRIMINATIONS. — As Applied to the Factual Situation set up in the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in sustaining the Validity of Sub-sections

(1), (2), (4), (6), (8) and (10), of § 5 of the Act, creating Arbitrary and Unreasonable State License Discriminations in favor of Single Store Retail Merchants, and against Chain or Multiple Store Retail Merchants, all doing business in one County—Contrary to the Due Process Clause and the Equal Protection of the Laws Clause of the 14th Amendment.

This Point was raised by § VII. (a) of the Amended Bill, R 14, and by §§ IX. XI. and XIV. of the Amended Bill, R 22, R 27 and R 37. This Point is a condensed restatement of the second, thirteenth and fourteenth assignments of error, R 172 and R 176.

So far as the language of the Florida Act is concerned, sub-sections (1), (2), (4), (6), (8) and (10) of § 5, are substantially the same scheme as sub-sections 1 to 5, inclusive of § 5 of the Indiana Statute (38 Fed. (2) 654), except that the upper brackets of the Florida Act, (6), (8) and (10), are about twice as high per store as the upper brackets of the Indiana Statute. As pointed out in the decision of this Court,

Tax Commissioners v. Jackson, 283 U. S. 527, 534,

the assessment against Jackson's 225 stores in the City of Indianapolis, under the Indiana Statute, was $5443.00. Under sub-sections (1), (2), (4), (6), (8) and (10), of § 5 of the Florida Act, as pointed out by Table 3, page 18, supra, the operation of the same number of stores in a single Florida County would require the payment of arbitrary

bracket fees in the sum of $7520.00—about fifty per cent (50%) more than required by the Indiana Statute.

Besides thus increasing the amount payable under the Indiana scheme, the Florida Statute, as we have seen, added many other discriminations and burdens, such as the County Line discrimination, discussed under Point 1, page 15 supra, the Distributing Warehouse discrimination, discussed under Point 2, page 37, supra, and the County License and Municipal License discriminations, discussed under Point 3, page 51, supra.

Aside from the very great differences in the provisions of the two Acts, the attack made under Point 7, stated above, is predicated primarily upon a *different factual situation* set forth in the Florida record. That is to say, a factual situation differing essentially and materially from that presented in the Indiana case, from that presented in the North Carolina case, and, in fact, different from that presented in any other chain store case previously considered.

It has been repeatedly held by this Court that a statute may be valid as applied to one state of facts, and yet invalid as applied to another.

Dahnke-Walker Mill Co. v. Bondurant,
257 U. S. 282, 289; restriction on buying wheat for interstate commerce;

Muller v. Oregon, 208 U. S. 412—Hours of Labor for women;

Chaselton Corporation v. Sinclair, 264 U. S. 543, 547-8—Housing Emergency Act;

Weaver v. Palmer Bros. Co. 270 U. S. 402—Prohibiting use of "shoddy" in the making of comfortables;

Seattle Trust Co. v. Roberge, 278 U. S. 116, 121—Zoning Ordinance;

Hans Rees' Sons Inc. v. N. C., 283 U. S. 123, 135, 4 h. n.—State Income Tax.

It is a further rule not to be overlooked, that

"What is said in an opinion of this Court must be limited to the facts and issues involved in the particular record under investigation."

German Alliance Insurance Company v. Home Water Company, 226 U. S. 220, last headnote;

"Every opinion of the Court is to be read with regard to the facts of the case, and the question actually decided."

Weaver v. Palmer Brothers Company, 270 U. S. 402.

As we shall subsequently point out, retail distribution, whether through operation of chain stores, or single unit stores, is subject to changing economic conditions. The Court judicially knows that economic conditions have been changing rapidly during the last few years, especially during the period of the depression, which still exists; and, therefore, any examination of practices in retail distribution as of the year 1929, such as shown by the testimony in the Indiana case, is now out of date, and of little value in determining whether or not a separate classification and

discrimination against retail distribution through chain stores is justified.

Atcheson Etc. R. Co. v. United States,
284 U. S. 249, 76 L. ed. 273.

Moreover, as pointed out by Point 8, stated page 14, supra, and subsequently to be considered, the Supreme Court of Florida attempted to predicate its decision upon alleged judicial notice, without allowing any opportunity to take testimony or otherwise test the supposed basis of such judicial notice. Hence it is important that we now bring to this Court's attention, not only the admitted averments of the amended bill, but also supporting data which this Court may judicially notice or consider as authentic information. Thus we shall present a

"factual foundation of *record* for overthrowing the statute."
O'Gorman & Young v. Hartford Fire Ins. Co.
282 U. S. 251, 258.
By the "record and brief" appellants present the "facts disclosing the reasons for the enactment of the present legislation or (and) the effect of its operation."
Hardware Dealers Etc. Ins. Co. v. Glidden,
284 U. S. 151, 158.

The majority opinion of the Supreme Court of Florida having thus cast the burden upon the appellants, the brief for appellants must necessarily be extended in order to bring

to this Court's attention matters which will show the error of the Supreme Court of Florida.

What are some of the outstanding ultimate facts and conclusions which distinguish this case from any case previously considered?

(1) *The Functions of Buying, Financing, Assembling, Warehousing and Distributing, and the Managerial Functions of Planning, Supervising, Watching Turnover, Accounting, etc., whether Advantages or Disadvantages, are performed by most of the Appellants outside of Florida, and, therefore, the State of Florida is not justified in putting such Appellants into a separate and discriminatory License Tax Classification, by reason of such Extra Territorial Exercise of such Functions.*

This general fact may be well illustrated by the business of the Appellant, Montgomery Ward & Company.

In a further report of the Federal Trade Commission upon the chain store inquiry, entitled

"Growth and Development of Chain Stores,"

published and distributed as Senate Document No. 100, 72nd Congress, First Session (of which the Court may take judicial notice), we find on pages 76 and 77, Table No. 4, showing the growth during certain periods of the leading national chain store enterprises in the United States. By that table it appears that on January 1, 1928, Montgomery

Ward & Company was operating thirty-six stores, and that on December 31, 1930, it was operating 556 stores.

The petition of intervention to which Montgomery Ward & Company is a party, R 92, shows that said appellant owns and operates only one store in the State of Florida, at Bradenton, Manatee County, on the South end of the Peninsula. The same section of the intervention shows that said appellant has its headquarters in Chicago, Illinois, but that its Florida retail store is conducted in substantially the same manner that any other similar store is conducted in that part of Florida. With only one retail store in Florida, headquarters in Chicago, and at least 555 retail stores scattered throughout every State in the Union, it must be presumed that said appellant exercises its buying power in Chicago; uses its credit there; devises its accounting system there; controls the stock turnover of its retail stores from Chicago; determines methods of display, and, indeed, performs in Chicago all other functions of a wholesaling and managerial character. If the exercise of such functions by Montgomery Ward & Company outside of the State of Florida could furnish the basis for the imposition of a Florida License tax, then, to be consistent, Florida might be justified in demanding of that concern a bracket arbitrary license fee of $500.00, rather than $5.00, for its one store, as provided in § 5 (1) of the Act under attack. But since that appellant has only the one store the Act concedes, and the authorities administering the Act must necessarily concede, that all of that appellant's extra territorial exercise of functions, wholesaling, managerial or otherwise, are utterly irrelevant, and cannot be resorted to as a justification for a discriminatory license tax, by reason

of the practices employed by that appellant in the conduct of its chain store enterprise. If it were competent for the State of Florida to seize upon that appellant's exercise of such functions outside of the State of Florida, as a basis for the imposition of a discriminatory Florida License tax, then every other State might do likewise, with the result that Montgomery Ward & Company would be taxed 48 times, for the exercise of functions, and the enjoyment of privileges, if they be such, within the State of Illinois and nowhere else. Suppose Montgomery Ward & Company were to open two additional stores in the same County, or in different Florida Counties? In either case we maintain that its extra territorial exercise of functions as aforesaid could not possibly justify the State of Florida in its imposition of the discriminations provided for by secs. 5 and 11 of the Act under attack.

The business of the appellant, J. C. Penney Company is another illustration of the same observations. In Senate Document No. 100, 72nd Congress, First Session, mentioned above, we find in table 4, page 77, that the J. C. Penney Company on December 31, 1930, operated 1452 stores. Section VII. of one of the petitions of intervention, R 91-92, shows that the same J. C. Penney Company operates only three Florida retail stores, one in Columbia County, one in Putnam County and one in Seminole County. It further appears from the introduction of that petition of intervention, R 89, that the J. C. Penney Company is a corporation organized and existing under the laws of the State of Delaware. It is a well known fact on the Stock Exchange, where its stocks are regularly quoted, that the headquarters of the J. C. Penney Company are in New York City, and

hence the chain store enterprise of the J. C. Penney Company, as related to the case at bar, stands upon the same footing as does the chain store enterprise of Montgomery Ward & Company—all of its buying functions and functions of supplying retail units and managerial functions such as mentioned with respect to Montgomery Ward & Company are in like manner exercised by the J. C. Penney Company outside of the State of Florida. As regards its three retail units in Florida, operated in three different counties, there is no integration whatsoever existing in the State of Florida. We have just observed that the statute itself admits, and the State officers of Florida admit, that they are not concerned with what Montgomery Ward & Company does outside of the State, and can go no further than bracket (1) of section 5 of the Act, plus the $3.00 per $1,000.00 on stock carried in the one retail unit. That being true as to the one unit, it should also be true as to the three units owned and operated by the J. C. Penney Company; and what should be true of three units operated in different counties should also be true regardless of the number of retail units operated in Florida, or in any other particular State.

The business of the appellant, Louis K. Liggett Company is a further illustration. In sec. VIII. of the amended bill, R 19, it is shown that the Liggett Company operates 22 stores in different counties of Florida; that parts of its retail stocks carried in those stores are supplied from factories outside of the State of Florida, and parts from the Company's warehouse in New York City, upon weekly or bimonthly requisitions from the individual retail stores, received by mail, wire or otherwise, in interstate commerce. Thus again, it appears that the Liggett Com-

pany performs its buying and assembling functions, warehousing functions, distributing functions and managerial functions outside of the State of Florida, and that as between its retail units within that State there is no integration whatsoever—at least none existing within the limits of the State of Florida.

We have seen in discussing the distributing warehouse discrimination, Point 2 of this argument, page 37, supra, that §§ 5, 2 and 8 of the Act under attack operate to create a distributing warehouse discrimination against chain store operators in the form of an excise tax of $3.00 per $1,000.00 on goods carried in such distributing warehouse. Such additional excise tax, even if it were only $1.50 per $1,000.00, the amount charged to regular wholesalers, could be justified only on the ground that such warehousing privilege was exercised *within* the State of Florida.

In the case of

> St. Louis Compress Co. v. Arkansas, 260 U. S. 346, 67 L. ed. 297,

Mr. Justice HOLMES delivering the unanimous opinion of the Court, said:

> "It is true that the State may regulate the activities of foreign corporations within the State, but it cannot regulate or interfere with what they do *outside*." (Italics ours.)

The Arkansas case was followed in

Campania Etc. v. Collector, 275 U. S. 93-95,
72 L. ed. 181,

the Court observing:

"Taxation is regulation just as prohibition is."

Again. in the case of

Farmers Loan & Trust Co. v. Minn. 280 U. S. 204,
214, 74 L. ed. 371, 376,

Mr. Justice STONE delivering a concurring opinion, said:

"To sustain a privilege tax the privilege must be enjoyed in the State imposing it."

Obviously, therefore, the State can collect no warehousing tax, that is to say $3.00 per $1,000.00 on goods carried for distribution through retail units, upon any part of the goods warehoused and stored by the Liggett Company in its New York warehouse. Such warehousing being exercised in the State of New York, is entirely beyond the jurisdiction of the State of Florida, and no State can impose any excise tax for the exercise of that privilege other than the State of New York. The same rule must apply, we think, as to Liggett Company's exercise of other functions or privileges necessary to the conduct of its chain store enterprise in many States. It appears by table 4, page 76 of the aforesaid Senate Document No. 100, that the Louis K. Liggett Company, on December 31, 1930, owned

540 retail stores. But if the function or privilege of buying for all those stores is subject to an excise tax, such tax cannot be imposed by any State other than the State of New York. The same observations can be made as to its credit arrangements, however extensive, its cash discounts, if any, its employment of capital; its accounting system, however complete; its control of stock turnover, however rapid; its superior quality, if any, of management and methods; its centralization of management, its standardization of management, sales policies, etc. All of these functions, being exercised outside of the State of Florida, they are entirely beyond the reach of that State for any purpose—license taxation or otherwise. If the Liggett Company were to close up 21 stores in Florida, it could continue to exercise the functions last mentioned in precisely the same way, and yet the State of Florida admittedly could not exact of the Liggett Company more than state fee of $5.00 for the operation of that one remaining store, plus $3.00 per $1,000.00 on stock, although it would be a "chain store" precisely of the same character as the hundreds of other stores operated by that appellant in other States. That is precisely the same situation pointed out relative to Montgomery Ward & Company with respect to its one Florida store.

We may briefly consider the business of the Mellville Shoe Corporation for another illustration. In table 4, page 77 of the aforesaid Senate Document No. 100, it appears that the Mellville Shoe Corporation in December, 1930, operated 480 retail stores in different parts of the United States. Section V. of one of the petitions of intervention, R 90, shows that said corporation operates seven retail stores in different counties of Florida. At page 55 of the

record in the case of Penney Stores, Inc. v. George T. Mitchell, et al., dismissed by this Court on stipulation of counsel, on November 14, 1932, it appears that all merchandise sold by Mellville Shoe Corporation through its two Mississippi retail shoe stores is manufactured by the Mellville Shoe Corporation at Worcester, Massachusetts. Presumably the same is true relative to the merchandise sold through its seven Florida retail shoe stores. It follows, therefore, that it must go out and buy at sources of production the raw materials for the manufacture of shoes, provide for their transportation; do its financing; its manufacturing; and then its distribution upon requisitions received in interstate commerce from its several store managers in Florida and in other States. None of these extra territorial functions concern the State of Florida.

Similar observations might be made as to the candy and confectionery business of The Nunnally Company, as described in its petition of intervention, R 85. And similar observations might be made as to each of the other appellants, save perhaps three of the grocery companies, i. e., Winn & Lovett Grocery Company, the Southern Stores Corporation and the South Florida Stores Corporation. But here again, it must not be overlooked that this is a several appeal. The present appellants other than such grocery companies, stand upon an entirely different footing from the status occupied by Jackson, the complainant in the Indiana case. The record in that case shows that Jackson operated 225 retail grocery stores, also certain warehouses—all, however, within the City of Indianapolis. The result was that all integration of his business existed and was enjoyed in that jurisdiction. It is true that he had to

buy goods outside of Indiana and have them shipped to his distributing warehouses within the State of Indiana, but when they reached the warehouses they came to rest, and all other functions exercised by him in the conduct of his chain store enterprise were carried on within the State of Indiana. It follows, therefore, that the Florida case, as to nearly all of the appellants, is clearly distinguishable on that ground, as well as many others.

The Point under discussion was very clearly brought out by the decision of this Court in the case of

Hans Rees' Sons Inc. v. North Carolina,
283 U. S. 123, 75 L. ed. 879,

involving the North Carolina Income Tax law. On the factual situation presented by the record in that matter, this Court reversed the North Carolina Court and held that the contention of the State as to the allocation of income tax could not be sustained, and that the application of the statute sought to be made by the North Carolina authorities was void, because they sought to impose an allocation based on income earned and derived from business conducted outside of that State. Such application of the statute as had been made by the North Carolina Court was held to be in derogation of the 14th Amendment.

A similar construction of the New York Income Tax Law was made in the case of

People ex rel Alpha Portland Cement Co. v. State Tax Commission, 230 N. Y. 48, 129 N. E. 202, certiorari denied 256 U. S. 702, 65 L. ed. 1179,

opinion by Justice CARDOZA. Among other things, he said:

> "The statute prescribes a rule of allocation which, as applied to foreign corporations holding bonds and shares in other states, involves the artificial and arbitrary augmentation of the *value of the local privilege.*" (Italics ours.)

The same proposition has in a number of recent cases been applied by this Court to inheritance taxes, taxes on intangibles, and the like.

> Francis Biedler II. v. South Carolina Tax Commission, 282 U. S. 1, 75 L. ed. 131, (2 h. n. L. ed.);
> Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 74 L. ed. 371 (1, 3 and 4 h. ns. L. ed.);
> Baldwin v. Missouri, 281 U. S. 586, 74 L. ed. 1956, (3 h. n. L. ed.);
> First Natl. Bank of Boston v. State of Maine, 284 U. S. 312, 76 L. ed. 313—where a succession tax on intangibles (corporate stock) was held void.

In the last cited case the Court pointed out that before a tax upon a privilege can be sustained, there must be

> "a real taxable relation to the event which is the subject of the tax."

We submit, therefore, that in testing the Florida Act the test must be applied solely and exclusively to privileges enjoyed by appellants severally within the State of Florida, in comparison with like privileges enjoyed by other merchants engaged in the same lines of business. When such test is applied the discriminatory and arbitrary character of the Florida Act becomes manifest. This is so if we consider only sub-sections (1), (2), (4), (6), (8) and (10) of § 5 of the Act, without regard to the different County discriminations, the Distributing Warehouse discrimination, and the County License and Municipal License discriminations previously pointed out.

> (2) *Economic Changes in Florida since the World War—Construction of Paved Highways, Increased use of Fast Motor Vehicles, Shifting of Population from Country to Cities, Decentralization of Cities, and Establishment of numerous Sub-trading Centers—Changes in the Trading Habits of the Public—have Necessitated a very great Increase in the number of Retail Units, both of Chain Stores and of Independents; Whereas the Florida Act deprives Appellants Severally of the right to Increase the number of their Retail Units, and deprives them of the Right to freely Compete with each other, and with Independents, in a common Occupation of Life.*

The record in the Indiana case (283 U. S. 527) does not explain, nor did the briefs filed in that cause explain, WHY Jackson had 225 retail grocery stores in the City of

Indianapolis. In the absence of any such explanation, the majority opinion (283 U. S. 541), said:

> "More and more persons like the appellee have found advantages in this method of merchandising, and have therefore adopted it."

In § VI. of the amended bill at bar, R 9, it is, among other things, said:

> "That during the period from 1900 to 1919, with the coming of the automobile and a large shifting of population from the country to the cities, the chain store took on a more rapid growth."

And in the same section of the amended bill, R 12, it is further said:

> "Your orators would further show that the more general use of motor vehicles during the last decade, and the development of state and national highways have also had a material influence on the growth and development of the chain store method of merchandising. That two decades ago the shopping district of any city of consequence was in a comparatively restricted area, for groceries, as well as dry goods, and other retail merchandise. But with the advent of the automobile residential districts spread out over wide territory, and

> as the use of motor vehicles increased the congestion in the shopping district became so great that the consumers demanded a more convenient place to shop, with the result that small shopping centers began to develop, widely scattered, convenient to residential districts. That in the grocery line the chain store was a natural means of serving such individual community centers, and the same is true of the drug line. That on account of this economic change the so-called independent single store operators would have a monopoly in such small trading centers if the chain store operator is prohibited by discriminatory legislation from having more than one store."

The amended bill, R 13, further alleges that the construction of paved highways by State and Federal aid, throughout the country, including the State of Florida, has destroyed the isolation of farms, timber camps, etc., because with the use of swiftly moving motor vehicles such trade now comes to the large centers, such as Jacksonville, where they can have the advantage of better shopping facilities, and at more competitive prices. All of these averments in the amended bill, as well as others, were admitted by the motion to dismiss filed by the appellees.

The averments of § VI. of the bill, last above referred to, are sustained by further parts of the amended bill in this cause and exhibits thereto attached, for example, the

City Directory, exhibit 3 to the amended bill, and the newspaper advertisements, exhibit 4 to the amended bill.

The copy of part of the City Directory, exhibit 3, R 61 to 71, gives the street address of each of the 388 grocery stores then operated in the City of Jacksonville. Exhibit 4, being certain pages from the "Florida Times Union" of September 12, 1931, shows on page 12 a full page advertisement of "Better Food Stores", and on the margins of that advertisement appear the street addresses of the several stores operated under the name "Better Food Stores." The location of each such store, and the location of each "Whiddon" store shown by the directory represents a sub-trading center within the limits of the City of Jacksonville, and in each such sub-trading center will be found a group of grocery stores, filling stations, and one or more drug stores.

As to the grocery business, the amended bill presents even a more concrete study and showing as to the effect of the economic changes above mentioned.

In § XI. of the amended bill, beginning R 27, it is said that there is very keen competition in the grocery business in the State of Florida, and that competition exists at each of the sub-trading centers in the City of Jacksonville, as indicated by the street addresses shown by the City Directory, and by page 12 of exhibit 4, being the addresses of "Better Food Stores."

The averments of the amended bill concerning the economic changes now under consideration are also sustained by the Federal Census Reports for Florida (judicially noticed). The Census Reports for Florida for 1910, 1920 and 1930 show the following:

	1910	1920	1930
Total Population of the State	752,619	968,470	1,468,211
Total Urban Population	219,080	355,825	759,778
Total Rural Population	533,539	612,645	708,433
Total Rural-Farm Population		279,370	274,949
Total Rural-Nonfarm Population		333,275	433,484

These figures are significant in showing that the total population of the State during the last twenty years has about doubled, but that the total rural farm population was in 1930 much less than it was even in 1920, and this though we take into consideration the fruit growing and vegetable industries in the southern part of the State.

Further interesting facts are disclosed by examination of the census for the same periods covering the northern tier of the Counties of Florida, from Leon County east to Duval County, and we find the following:

	1910	1920	1939
Jefferson County	17,210	14,502	13,408
Madison County	16,919	16,516	15,614
Suwannee County	18,603	19,789	15,731
Columbia County	17,689	14,290	14,628
Hamilton County	11,881	9,873	9,454
Nassau County	10,525	11,340	9,375
Duval County	75,173	115,540	155,500

These figures reveal the fact that in each of these counties except Duval the population has steadily decreased since 1910. This is particularly noticeable in counties heretofore chiefly engaged in agriculture, such as Jefferson, Suwannee and Hamilton.

Along with these tremendous decreases in the farming sections, we find the following census figures as to the City of Jacksonville:

	1900	1910	1920	1930
Jacksonville	28,429	47,699	91,559	129,459

The statutes of the State of Florida have from time to time designated by number what highways should be constructed by the State Road Department, so that the Courts judicially know that Jacksonville, whose population has so tremendously increased during the last three decades, is now readily accessible over paved State highways from every direction—State Road No. 17 from Fernandina; No. 4 from Waycross; No. 1 from Tallahassee and intervening points; No. 13 from Gainesville and Starke; No. 3 from Palatka and Green Cove Springs; and No. 4 from Daytona Beach and St. Augustine. On account of these paved highways and speedy small type automobiles now in use, all of the small towns within a radius of fifty to one hundred miles of Jacksonville have become mere suburbs of the City of Jacksonville, so far as shopping purposes are concerned. It follows that the small towns along these numerous paved highways have lost their trade in two ways: (1) the shifting of population from rural farm communities to cities; and (2) the shifting of trade from that part of the population still remaining in the small towns and rural communities to the large centers.

The economic changes in the shifting of population and in the trading habits of the public have not been confined to Florida. On the contrary, we find they have been general throughout the United States.

We now call the Court's attention to further data, competent for consideration under the following decisions:

Standard Oil Co. v. United States,
283 U. S. 163, 171, 172, 176, 177 and 178; and footnotes 5, 6, 10, 11, 14, 16 and 17;
Frost v. Corporation Commission, 278 U. S. text 549, footnote 35;
St. Louis Etc. R. Co. v. United States,
279 U. S. 514 to 519, and footnotes 49 and 52;
Indian Motocycle Company v. United States,
283 U. S. 570, 581, footnotes 1 and 2.

In 1926 the United States Department of Commerce published a pamphlet entitled

"Retail Store Problems,"

also known as "Domestic Commerce Series—No. 9." That pamphlet represents a series of impartial investigations made under government supervision. At the bottom of page 21 it was noted that Dr. Copeland, in an article which appeared in the "Harvard Business Review," pointed out that from the standpoint of the consumers' buying habits, retail stores are roughly divided into three classes: (1) Convenience goods; (2) Shopping goods; (3) Specialty goods. The subsequent discussion shows that by "Convenience goods" is meant groceries and drugs, and other commodities usually put up in standard packages, or sold by standard grades. "Shopping goods" are such as clothing, jewelry, hardware and the like. To like effect was the testimony of Mr. Lyons in this Court's record of the In-

diana case, page 73. Beginning at page 93 of the same pamphlet is a reprint of Bulletin No. 394, subject "Vehicular Traffic Congestion and Retail Business," and at page 95 of that pamphlet, embracing that bulletin, it is pointed out that as our Cities continued to grow the acute congestion of traffic pushed the population away from the centers to widely distributed residential communities. Beginning at page 108 of the same pamphlet some of the effects of such congestion on the buying public are noted—danger element, loss of time, inconvenience, anxiety, etc. At page 111 it is further said:

> "Necessary business which cannot be satisfactorily transacted in one location will find a location where it can be transacted. *It is natural for store patronage to follow the line of least resistance.*" (Italics ours.)

It is then noted that as a result sub-trading centers have been established where the customers can be conveniently served; and the bulletin embraced in said pamphlet continues:

> "The subcenter shopping district no longer consists of only the corner grocery, a drug store and a delicatessen. It includes stores representing all kinds of merchandise and usually a bank. In our largest cities the subcenter is a complete shopping district, differing from the down-town district only in size and magnitude of establishments . . . In some of our

> **largest cities down-town merchants have sensed the situation and are establishing branch stores in subcenters."**

On page 112 of the same pamphlet we find this very pertinent paragraph:

> **"If that retail business which cannot be accommodated in our decentralizing cities is being diverted to each city's subcenter shopping districts, what of that business in centralizing cities and small communities? These cities and communities do not face the problem of having trade diverted within their own limits; rather their problem is of having trade diverted to neighboring cities and communities. The present survey indicates that no small proportion of the trade in one community finds its way by means of the automobile to the next largest community or city, and so on until this chain of diverted trade reaches the metropolis, where traffic congestion is so great that the owner-driven automobile is seldom used for shopping purposes and where entrance to the City is made by means of train and bus. It appears, therefore, that both the merchant of the decentralizing city and the merchant of the centralizing city must meet the problem of diverted trade. In the former case it spreads out within the City limits; in the latter, it has left the City for the next largest community."**

Further study of the same subject,—the shifting of population and the effect of motor traffic,—was made by a Committee on Business Research of the University of Nebraska, and the result of their studies was published in 1927, and entitled:

> "The Influence of Automobiles and Good Roads on Retail Centers."

That study contains tables showing the extent of the shifting in trade from small centers to larger ones, and it is pointed out that the trade in groceries most of all remains at the local center. At page 39 of that study it is pointed out, just as in Bulletin No. 394 above referred to, that in the large centers, such, for example, as Jacksonville, Florida, subtrading centers have been established as a *necessity*, due to traffic congestion in former retail trading districts. In the concluding part of that pamphlet, it is said:

> "In the past the country merchant knew very little of this competition, but the automobile has brought him face to face with it . . . After all it is not so much the country merchant against the city merchant as it is the small community against the larger one."

At page 59 of the same pamphlet it is further pointed out that *such economic changes have also produced cooperative buying, better methods of merchandising, and that these have been adopted by all progressive merchants without distinction.*

The same economic changes are discussed by Professor E. C. Buehler, of the University of Kansas, in his "Chain Store Debate Manual," (1931), page 23. He points out that in 1910, 60% of the people lived in the country and small towns, whereas in 1930 the ratio had been completely reversed, 60% in the cities and 40% in the country and small towns.

The same observations were made in a study by Professor Marc N. Goodnow, of the University of Southern California, in an article appearing in "Nations Business" for December, 1931, at page 28. He discusses and cites figures to show the extent in the shifting of trade from small towns to large centers, due to the construction of highways and the use of automobiles.

Another instructive study on the same subject is by Professor W. Russell Tylor, of the University of Illinois, entitled:

"The Exodus of Rural America,"

appearing in "Current History," issue of December, 1931, beginning at page 404. Professor Tylor notes in particular two tendencies above discussed: (1) the centralization to the larger cities; and (2) the decentralization of the larger cities producing growth of suburbs and subtrading centers.

The studies above cited, supporting as they do the averments of the amended bill, account very largely for the very great increase in the number of retail units for the distribution of "convenience goods", groceries, drugs, etc. in the larger towns and cities, such as Jacksonville, Florida, to which population has been drawn, and where that population has decentralized into suburbs, demanding for con-

venience the establishment of a great number of subtrading centers.

Some further observations are pertinent as to the effect of the construction of paved highways all over the State of Florida, and, for that matter, all over other states, and the increased use of fast moving motor vehicles. We have noted that the amended bill, R 13, alleges that the construction of highways and the use of automobiles has destroyed the isolation of farms, timber camps, etc. The effect of those economic changes on the trading habits of the public, is further illustrated by the petition of intervention to which Montgomery Ward & Company is a party, R 92, where it is said:

> "That within the last few years it has opened a number of retail stores in different parts of the United States, and has opened one such retail store in Florida."

Also: "That it carries in said store a large assortment of general merchandise such as is usually found in a small department store."

In this Court's record of the Indiana Chain Store case, bottom page 85, Mr. Lyons testified that the two great mail order houses, Montgomery Ward & Company and Sears Roebuck & Company, had within the last two years, that is two years prior to January, 1930, the time when the testimony was taken in the Jackson case, entered the chain store field. At page 112 of the same record Dr. P. H. Nystrom testified (January, 1930):

> "It also begins to look as if the mail-order houses, would soon become important chain store factors. Sears, Roebuck & Company have apparently started out to establish a chain of department stores, most of which at the beginning of 1928 were located in the larger cities, but Montgomery, Ward & Company has commenced a plan of establishing unit stores mostly in medium and small sized towns."

We have previously noted, quoting Senate Document No. 100, 72nd Congress, First Session, that on December 31, 1930, Montgomery, Ward & Company then operated 556 retail stores — small department stores — distributed throughout the United States. We have also previously noted that at the same time the J. C. Penney Company owned and operated 1452 stores in different parts of the United States, but only three in Florida, purposely located, as stated in its petition of intervention, R 91-92, in towns of moderate size,

> "where its stores, carrying high grade merchandise, wearing apparel, and goods usually found in a small department store will be accessible to farmers, laborers and other classes of working people, who have limited means, and desire to avail themselves of the opportunity to buy standard goods at low prices."

Thus it appears that the same economic changes which have caused the mail-order houses to enter the chain store

field have also operated to increase the number of retail units by an enterprise such as that conducted by the J. C. Penney Company. With the construction of net works of paved highways and the increased use of rapidly moving motor vehicles, the mail-order house lost its prestige theretofore enjoyed by distributing voluminous catalogues and shipment of merchandise by mail and express. Moreover, the large department stores in the principal trading centers, such as Cohen Brothers, in the City of Jacksonville, were drawing a tremendous share of the "shopping goods" trade from the remainder of the population still in the country and small towns. The trading habits of the public generally had established a buyers' market. The result has been that such retail units as those of Montgomery, Ward & Company and J. C. Penney Company have gone into direct competition with the large department stores in the larger Cities.

In this Court's record in the Indiana Chain Store case, p. 111, Dr. Nystrom testified: that the increased use of automobiles and the development of good roads have so changed the habits of the buying public

> "that the small community without a chain store is almost hopelessly lost. But the small community, with a chain store, offering big city trading conditions and prices keeps on being a trading center, not only for the chain store, but for other retailers as well; so that the trade of the small community is saved by the existence of the chain store."

In this Court's record in the Mississippi Chain Store Case, Penney Stores, Inc. v. George T. Mitchell, et al., dismissed by stipulation of counsel, November 14, 1932, undisputed testimony was given at pages 261 and 264, to the effect that

> "The operation of a store of J. C. Penney Company, Inc. in a town is positively beneficial to the other retail merchants . . . J. C. Penney Company, Inc. never locates a store in a community unless it is invited to do so."

Since the trading habits of the public have thus directly caused such increase in the number of retail units, and since the public is the actual beneficiary of this new development in retail distribution, not only in the sub-trading centers of the larger cities and towns, but as well in the small communities desiring to save a part of their trade, no possible basis remains for punitive legislation directed against the operation of more than one retail unit by the same owner.

Notwithstanding the economic developments above demonstrated, it may still be contended that chain stores have absorbed the major part of the increased demand for more retail units, and that the mortality among "independents" is largely chargeable to the chains. These matters have been officially investigated, so that we are again entitled to bring to the Court's attention the results thereof.

In Senate Document No. 100, 72nd Congress, First Session, the Federal Trade Commission's letter of transmittal,

dated June 11, 1932, notes the fact that in public discussion it has been supposed that the chain had an important role in reducing the number of independent stores, either through buying them out, or as a result of competition. The letter of submittal shows that the inquiry covered openings and closing of 1591 chains, up to December 31, 1928, and partially through the years 1929 and 1930. The letter further points out:

> "Of the total acquisitions by reporting chains it is estimated that only 12 per cent were acquired from independents, thus accounting for less than 2 per cent of the total growth of chains through 1928."

Also that

> "Acquisitions as a whole were predominantly of chain stores rather than of independent stores."

As to chain store closings, the letter of transmittal further points out that

> "More than half (5,853) of the total closings reported were in the two years, 1927 and 1928. Beginning with 1920, the closings show a constant and sharply increasing trend from 204 units in that year to 3,298 units in 1928."

At page 8 of the report it is pointed out that the striking increase in ratio of acquisitions shown in the years 1925 to 1929

> "may not be anything more than the accompaniment of the boom period combined with the fact that about this time or a little earlier the *investment banking houses* had discovered the chain store. This situation is confirmed to some extent by the correspondingly abrupt decline of acquisitions to 11.1 per cent of the total additions in 1930, and a decline in the ratio of acquisitions to stores in operation on January 1 of from 6.2 per cent in 1929 to less than 1 per cent in 1930."

If the report of closings had included 1931 and 1932 it would appear that the peak of increase was reached in 1928, and that chain stores, like other businesses, have fallen in piles, due to the economic depression. The Treasury reports show that in 1931 nearly 2300 banks failed in the United States. Chain stores and "Independents" have not escaped.

Along with the foregoing data as to openings and closings of chain stores, the letter of the Federal Trade Commission, transmitting Document No. 100, gives the following comparison in openings and closings of "Independents":

> "A comparison for the 10 years, 1919-1928, of the openings and closings of chain-store units, as

> reported to the commission, with the corresponding figures of Buffalo, N. Y., independent merchants in the grocery, drug, hardware and shoe fields (published by the University of Buffalo, Bureau of Social and Business Research) indicates that the opening rate of independent stores is substantially *higher* than that for the stores of chains. On the other hand, the independent closing rate is nearly as high as their rate of openings, whereas the chain rate of closings is roughly one-fourth that of their openings." (Italics ours.)

Thus it is demonstrated by the Federal Trade Commission that while there was up to the end of 1928, and possibly to some time in 1929, a large increase in the number of chain store retail units, there was even a greater increase in the number of single store retail units, even though the latter did not have the impetus supplied by the *investment banking houses.*

It is obvious, therefore, that the changes in the buying habits of the public, and the very great increase in the number of subtrading centers, as previously pointed out, have been chiefly responsible for the very great increase in the number of retail units of all types of ownership.

This brings us to the inquiry of whether or not chain stores have been in any measure responsible for the mortality among "independents?" In answer to this inquiry, we now ask the Court's attention to a bulletin issued by the

United States Department of Commerce in 1932, designated "Domestic Commerce Series, No. 59," subject

"Causes of Failure among Drug Stores."

The foreword of the bulletin, among other things, says:

> **"The drug store of today little resembles that of a few years ago. Changes have been frequent, and the results accruing have been profitable to many druggists throughout the country. But a great number have been unable to keep pace with the progress made by the more efficient."**

It is further shown that the survey was conducted in 1931 by the Department of Commerce in the City of St. Louis, with the aid of certain well known organizations, covering thirty failed drug stores. The bulletin shows, beginning page 4, the causes of the failures predominating in the order stated: Insufficient capital, Inexperience, High Rent, Poor Business Location, Poor Business Management, Dishonesty, Bad-Debt Losses, and Inadequate Records. Pages 10 et seq. of the bulletin discuss

> "Causes of Failure beyond Control of those who Failed."

It is then noted that eleven out of the thirty druggists reported that the primary cause of their failure was the "business depression," but upon analysis it was found that

six were insolvent from the time they entered business; that of the eleven none kept adequate records; that ten of the eleven were charged with gross incompetence; that in four cases a majority of the creditors reporting charged unethical practices. On page 11 of the same bulletin, on the subject of "Competition," it is shown that twelve of the thirty druggists had claimed that their failure was due to competition, but upon investigation it was found that in only one case was that the apparent cause; that a large chain store organization had a very attractive store directly across the street from the druggist who failed, and there did not seem to be sufficient business in that immediate neighborhood for both stores. That ten of the group stated they were unable to remain in business because there were too many other drug stores (not chain stores) in their immediate neighborhood. Four of the group of thirty expressed a desire to be quoted to the effect that

> "Although they had chain store competition, it affected their businesses only remotely and was in no way responsible for failure."

Under that section the bulletin further says:

> "There are many examples in all lines of business which show that the merchant with ability and willingness to work, to utilize improved methods and to take advantage of new conditions, and with a reasonable margin of capital, succeeds in the face of unusually keen competition."

We next ask the Court's attention to information made available on November 7, 1932, by the United States Department of Commerce as to the principal causes of bankruptcy during the last twelve years. The major aspects of that survey are set forth in the U. S. Daily of November 8, 1932, page 1, column 5, and page 7, column 1. It is said that inefficient management and unwise credit were the principal factors; that the depression had a negligible influence. Dealing more with details, the survey pointed out, among other things, that the vast majority of bankrupt concerns were small enterprises, employing small capital of $5,000.00 or less; that over 68% of the owners or managers had not completed a high school education; that over 57% of the bankrupt businesses had no accounting records; that the accounting records of an additional 28% were inadequate for the needs of the business. That survey plainly shows that chain store competition had little or no influence whatsoever on such bankruptcies of retail concerns.

A study of the changes in the buying habits of the public, and their effect upon retail merchants undertaking to serve the public, would not be complete without also taking into consideration the further fact that the splitting of a business into many units carries additional overhead; additional rents, light and water bills, more employees, a separate manager for each store, and, in fact, a complete list of overhead expenses for every unit; much of which could be avoided if the same volume of business could be done under one roof. All these factors apply to every chain store unit to the same extent as to single store units. Moreover, the single store owner carries no cost incident to warehousing, or the assembling and distribution of the

goods; sustains small losses on account of declining prices, as compared with chain store volumes; all of which, coupled with the personal equasion and contact with customers, give independents operating in Florida an even break for the consumers' dollar.

We now submit that the changed economic conditions and the changed buying habits of the public are chiefly responsible for the great increase in all types of retail units, rather than the profits derived from operations. But in any event, the Florida Act, particularly § 8, paid no regard to profits or size of business. Instead, the tax is measured by the number of places of retail sales, and hence it again seems to us that comparison of advantages or disadvantages, or the profits derived from one type of operation or the other, are for the most part entirely irrelevant.

If the American principle of free competition in domestic trade is to survive, then every merchant must be allowed to split his business, if he so desires, in order to compete on equal terms with other merchants, not only in primary trading centers, but also in sub-trading centers and in small town centers.

Dr. Miles Medical Co. v. Park & Son Co.,
220 U. S. 373, 394, 400, 404, 406.

The Federal Trade Commission has been pursuing chain store inquiry for about four years. As yet the Commission has not found or reported anything in regard to the operation of chain stores which warrants remedial legislation, much less punitive legislation. If any evil had been found the Anti-Trust Act, or some such remedy, should be

applied—not a tax measure in disguise. The Florida Act operates to foster monopoly, rather than otherwise.

New State Ice Company v. Liebmann,
285 U. S. 262.

If it be contended that such statute is necessary to protect independents, then

"This shows in a still stronger light the unconstitutionality of the tax."
Caldwell v. North Carolina, 187 U. S. 622, 626.
People v. Gilson, 109 N. Y. 399. 17 N. E. 343, quoted page 61, supra.

(3) *Improved Retail Distribution Practices, locally Employed in Florida by Chain Stores, are being Employed with equal Success by Voluntary Chains and Wide Awake Independents, with the result that No Taxable Difference exists by Reason merely of the Character of Ownership.*

This question was to some extent considered by this Court in the Indiana case (283 U. S. 527, 535) where the majority opinion said:

"With respect to associations of individual stores for purposes of cooperative buying, exchange of ideas as to advertising, sales methods, etc., it need only be remarked that these are voluntary groups, and that series of independent units cannot, in the nature of things, be as efficiently and successfully integrated as

a chain under a single ownership and management."

We shall first take note of what was before the Court on that subject, and then point out the very great changes which have taken place in the three years since the testimony in the Indiana case was taken, and we shall take particular note of Florida conditions as they exist at this time. In short, we propose to show that the Florida record presents an entirely different factual situation.

The record brought to this Court in the Indiana case shows that the testimony as to "voluntary chains" was given by Mr. Robert W. Lyons, and by Dr. P. H. Nystrom of Columbia University. The testimony of Mr. Lyons on the subject of "voluntary chains" as they then operated in Indiana, in the latter part of 1929 (testimony having been taken in January, 1930), appears pages 75, 76, 89, 90 and 91 of the Indiana record filed in this Court. The testimony of Dr. Nystrom on the same subject appears in the Indiana record filed in this Court, pages 102, 103 and 104. At page 75 of that record Mr. Lyons spoke particularly with reference to the Independent Grocers' Alliance, with headquarters in Chicago, then operating in Indiana, there being then affiliated with that organization some 10,000 retail food merchants. He outlined on pages 75 and 76 the general plan of cooperation between the Alliance and its so-called independent retail units. At page 89 of that record, Mr. Lyons further said:

"The cooperative plan has made it possible for the individual merchant using that system to

operate his business with as much profit as can be found in chain store operation."

Following that statement, he gave further details as to the plan of operation used chiefly by the Independent Grocers' Alliance. At page 90 of that record, Mr. Lyons said:

"Under the cooperative plan, as distinguished from the chain store plan, generally the management of the store and its ownership remains in the party operating the unit, the independent merchant who has his own capital and stock."

On pages 90 and 91 of that record Mr. Lyons further compared the methods of advertising pursued by the Independent Grocers' Alliance and that pursued by some of the chain stores.

At page 102 of that record, Dr. Nystrom said:

"I do not know of any quality that contributes to good merchandising which is available to chain stores that is not also available to unit stores."

At page 103 he said:

"The co-operative movement is a very live movement and is progressing over the country almost like a *tidal wave*." (Italics ours)

He then referred to the survey just completed in December, 1929, by the American Institute of Food Distribution, and quoted figures from that publication as to the

progress being made in the organization of "voluntary chains." That reference to the latest survey of the subject shows that the record before this Court in the Indiana case was certainly limited in its scope to the developments which had taken place up to the end of 1929. *What has happened since then is new matter, and what has happened in Florida is new matter.* At page 103 of that record Dr. Nystrom further said:

> "I do not know of any advantage in price growing out of quantity buying which is available to the chain store that is not also available to these co-operative groups. In addition to buying, additional service is rendered to members of the co-operative group by the co-operative organization."

At page 104 of the record he said:

> "I feel sure that the buying advantage of chains not only can be, but has been equaled by co-operative buying groups."

What does the Florida record show on this subject?

Section XI. of the amended bill, R 27 to 35, shows what "voluntary grocery chains" were doing in Florida shortly before the filing of this suit—that is to say, during September and October, 1931. As before mentioned, the full page advertisement of "Better Food Stores" is shown on page 12 of the newspaper, Exhibit 4 to the amended bill. At R 28 it is alleged:

> " 'Better Food Stores' are a group of individually owned grocery stores affiliated with Lewis-Chitty Consolidated Grocery Company."

Then follow averments that the wholesale Company owns and operates branch wholesale houses at Tampa, Orlando, Cocoa, Miami and at other points in the State. The advertisement page 12, Exhibit 4, is then referred to calling attention to the fact that the slogan of "Better Food Stores" is

> "Individually owned, Operated Collectively—Your Neighborhood Grocery Stores."

It is next shown that "Better Food Stores" is a trade name, belonging to a corporation, the title of which is "Better Food Stores, Inc.," organized June 8, 1931, by certain stockholders and business associates of the wholesale Grocery Company. It is further shown that the Bill which was afterwards passed in the First Extra Session of the Legislature was substantially a copy of a similar Bill that had been introduced in the regular session, and therefore, the organization of "Better Food Stores, Inc." was merely a buffer between the wholesale Grocery Company and the retail units with whom it expected to affiliate, the intermediary or buffer organization between the wholesaler and the "individually owned" retail units would be sufficiently broken as not to subject the "individually owned" retail units to the ascending bracket license provisions of § 5 of the Act, then in contemplation. At R 29 the amended bill further avers that the formation of such

"cooperative groups as represented by said 'Better Food Stores' has been encouraged and fostered by the discriminations created by said Act."

It is next shown that many other similar cooperative chains have been formed and fostered since the passage of said Act

"being assured thereby that they could so operate without being subjected to the excessive and discriminatory graduated license fees provided for by said Act."

The rapid growth of "Better Food Stores" is then shown, and it is then alleged that there is not only a group of stores operating under that name in and around Jacksonville but also in and around each of the other cities where the wholesale company owns and operates wholesale warehouses, as above mentioned.

The character of the affiliation between the wholesaler and such "individually owned" grocery stores is then alleged, and as one illustration of that relation, a copy of the "Clover Farm Stores" contract is attached to the bill as Exhibit 5. Further, at R 30-31, it is alleged that

"by such affiliations and cooperative organizations single grocery store owners have adopted the best features of chain store merchandising, and have secured substantially all the benefits derived therefrom, while at the same time they have avoided the burdens of capital investment, insurance, etc. incident to the car-

> rying of a large stock in a central warehouse, such as maintained by your orator Winn & Lovett Grocery Company, in Jacksonville, Florida, and Sanford, Florida.

It is next shown that the Winn & Lovett Grocery Company found it necessary to maintain a large force of employees and a fleet of trucks to deliver merchandise from its warehouses to its retail units, whereas the "individually owned" stores affiliated as "Better Food Stores", as aforesaid, have no such expense, and can obtain daily deliveries by motor trucks as needed, from the Lewis-Chitty Consolidated Grocery Company, with which they are under contract, as aforesaid.

The bill thus makes a complete showing of how the voluntary grocery chains in Florida are not only paralleling the regular grocery chains in the adoption of improved retail practices, but have even acquired superior advantages, such as above stated in the bill, and besides, have the good will and personal interest of the individual owners, as compared with the hired managers of the regular chains.

Section XI. of the bill further takes up the activities in Florida of the "Independent Grocers' Alliance," and states the scope and extent of its activities generally throughout the United States, as lately reported prior to the institution of this suit.

> "serving approximately 11,226,000 families, through more than 14,000 retail grocery stores."

The testimony given in the Indiana case showed that this

concern had then affiliated some 10,000 retail grocery stores. The averment in the amended bill shows very rapid progress and enlargement. The plan of affiliation and co-operation of the "Independent Grocers' Alliance" is then set forth in general terms; its extensive advertising system, at an annual expenditure of $557,000,00; its tremendous buying power, etc. It is next shown that that concern is affiliated with one wholesaler in Tampa, Florida, which wholesaler in turn is affiliated with 83 "I. G. A. stores" in Tampa, Florida and surrounding territory. Samples of the advertisements put out by the "I. G. A. stores" are shown as exhibits 6 and 7 to the amended bill. Finally, § XI. of the amended bill, R 32-33 avers

> "That there are many other voluntary chains or cooperative groups in the United States, not only in the grocery business, but in other lines, and the independent store owners so operating have adopted the best features of modern merchandising promulgated by chain or multiple store operators. Some of the methods in which regular chain stores took the lead, and which were then adopted by single store merchants, voluntary chains, or cooperative groups, are as follows:"

The quotation next appearing, R 33 to 34, was taken from pages 17 and 18 of the third "Voluntary Chain" Report by the American Institute of Food Distribution. The foreword by the Executive Committee of that Institute, appearing as a part of that third report, is dated September,

1930. The same foreword shows that the second "Voluntary Chain" Report gotten out by the American Institute of Food Distribution was published in February, 1930. As we have heretofore noted, Dr. Nystrom testified in the Indiana case in January, 1930, and in the course of his testimony, page 103 of the Indiana record, referred to a certain survey having been completed by that Institute. Obviously that had reference to the second report of the Institute completed in December, 1929, but published in February, 1930. And, therefore, the extracts quoted in the amended bill, R 33 and 34, from the third report of the Institute, represent practically one year later in the development of "voluntary chain" activities in the grocery field. As previously noted, Dr. Nystrom also testified that the cooperative movement was spreading over the country

"almost like a tidal wave."

By the time this case is considered by this Court, the "tidal wave" thus spoken of will have been in progress practically three years since the period of which Dr. Nystrom testified, and since the period upon which the decision in the Indiana case was predicated. It becomes necessary, therefore, for the Court to consider not only the showing made by § XI. of the amended bill, as above explained, but also more recent studies, such as reports of the Federal Trade Commission, and further reports by the American Institute of Food Distribution, in order for the Court to be fully advised of the "present state of the art."

Muller v. Oregon, 208 U. S. 412, 419, 420;
Standard Oil Company v. United States,
283 U. S. 163, 171, 172, 176, 177 and 178;
and footnotes 5, 6, 10, 11, 14, 16 and 17.

The quotations, R 33 and 34, from the third report of the American Institute of Food Distribution, constitute a deadly parallel, showing how completely modern practices of retail merchandising, capable of local application, have been appropriated and applied by voluntary chains. The amended bill, R 34, then further complains:

> "That although members of such voluntary chains or cooperative groups are doing business in the same way, and have adopted the same features of merchandising first promulgated by chain store operators, the said Act of which your orators complain undertakes to impose excessive burdens of State license taxes provided for by brackets 1 to 11, inclusive, of section 5, of said act, upon your orators and other chain store operators similarly situated, while not placing the same corresponding burdens upon members of said voluntary chains or cooperative groups."

It is next alleged that the Legislature knew that the "Independent Grocers Alliance" was already operating in Florida, and that the complainants in this suit were already operating in Florida before the passage of said Act, and that said Act was

> "a deliberate attempt to destroy the businesses of your orators, and of other chain store operators similarly situated, by excessive taxation, and to compel them to disintegrate their several businesses and confine their operations to one store in one locality only—",

contrary to the due process clause and the equal protection of the laws clause of the 14th Amendment, etc.

Section IX. of the amended bill explains what was being done in Florida shortly before the filing of this suit by the voluntary drug chain of McKesson & Robbins individually owned drug stores, operated in affiliation with "McKesson & Robbins, Inc." manufacturer and wholesaler, now owning and operating a chain of wholesale drug houses at four points within the State of Florida. The operations of that concern are then explained and illustrated by exhibits 1 and 2 attached to the amended bill. The extent of that concern's operations is alleged to be

> "That the total number of independent drug stores in the United States and elsewhere in like manner affiliated with said McKesson System, is 57,000. This fact was broadcasted to the world in a McKesson radio program on November 2, 1931."

In that paragraph it is also alleged that there are in the City of Jacksonville alone 35 individually owned drug stores affiliated with the McKesson system. Further parts of § IX. of the bill show the nature of the affiliation, and

the mutual benefits flowing to the wholesaler and the individual units by reason thereof; and in the concluding part of § IX. of the bill it is shown that the Legislature also knew when the Act in question was passed that the McKesson-Robbins combination was in operation in Florida at that time.

> "Nevertheless said Act deliberately undertakes to favor individually owned drug stores affiliated with such organizations, as aforesaid, and to impose oppressive, arbitrary and excessive burdens of taxation upon such merchants as your orator Louis K. Liggett Company *simply and only* because without subterfuge they own and operate a number of stores under one ownership and management."

Further and more specific averments as to the non-existence of essential local differences or advantages enjoyed by multiple store owners, as compared with single store owners, operating in Florida, are set forth in § XIV. of the amended bill, R 37 to 49. That section of the bill takes up each alleged difference or advantage discussed by the majority opinion of this Court in the Indiana case, and shows that on account of the "progress in the art", or rather, the progress of the "tidal wave", mentioned by Dr. Nystrom in his testimony given in the Indiana case, an entirely different factual situation now exists in Florida, and, as we shall presently note, the "tidal wave" has been continuing ever since this suit was instituted.

In considering all these averments of the amended bill,

it must be borne in mind that the motion to dismiss, R 77, admits them to be true. Nevertheless, the majority opinion of the Supreme Court of Florida disregarded all and singular the aforesaid admitted facts, and set up its own judicial fiat, predicated upon alleged judicial notice, without any definition as to the basis thereof. We shall now present matters, of which this Court can take cognizance, not only supporting the admitted facts alleged in the amended bill, but further, demonstrating the unsoundness of the conclusions stated by the majority opinion of the Supreme Court of Florida.

In order to more definitely define the development of "voluntary chains" as of the date (January, 1930) testimony was taken in the Indiana case, we respectfully call the Court's attention to the second report of the American Institute of Food Distribution, published in February, 1930, and containing a table on page 8, as of December 1929. Trade journals have frequently been considered by this Court as supplying authentic information in cases dealing with particular trades:

Ohio Oil Co. v. Conway, 281 U. S. text 155, 74 L. ed. Text 780;

St. Louis & O'Fallon R. Co. v. U. S. 279 U. S. text 520, 521, 73 L. ed. text 824, 825;

Standard Oil Co. v. U. S. 283 U. S. text 171, 173, 75 L. ed. text 946, 947.

The foreword to the second report of the American Institute of Food Distribution, by Gordon C. Corbaley, President of the Institute, among other things, says:

"Organizing to parallel the operations of the chains has been going on for several years, but it was not until about *twelve months* ago that the Food Institute began to study and classify this movement, calling it by the now generally accepted name 'The Voluntary Chains'." (Italics ours)

"Thus far voluntary chain growth has been generally *crude and inefficient* . . . . . The controlling fact now coming to be understood is that this groping through into a new basis of merchandising relationship between factors formerly cherishing their independence of each other is a movement that is largely paralleling the development of the older chains and the combined effect of the two is bringing a *great change* in the entire structure of food distribution." (Italics ours)

"The purpose of the Food Institute staff is to develop the facts and to help put them before the trade in such a way as to speed more intelligent action."

"The following pages give the high lights from what is necessarily a continuing work. The growth of the voluntary chains is *moving rapidly*. New facts are developing each day. *Trends* are becoming more definite." (Italics ours)

Such then, is a general statement of the "state of the

are" as of the period about which Dr. Nystrom testified in the Indiana case. The majority opinion, 283 U. S. 535, stating that "in the nature of things" volutary chains could not be

> "as efficiently and successfully integrated as a chain under a single ownership and management,"

was obviously based upon such "crude and inefficient" development of the "voluntary chains" as it then existed. On page 5 of the same report the Institute gives a definition of "voluntary chain" as follows:

> "A voluntary chain is a group of retailers (each of whom owns and operates his own store) either associated with a wholesale grocer, or acting cooperatively, organized to carry on joint merchandising activities and to combine wholesale and retail functions under one control so as to meet regular chain store competition."

That definition has continued to adhere to cooperative groups combining the wholesale function and the retail function, although as we shall now point out, the "voluntary chain" or "cooperative chain" has continued in development and organization.

An official study covering the same period as the second report of the American Institute of Food Distribution, is Senate Document No. 12, Seventy-second Congress, First

Session, being one of the reports of the Federal Trade Commission on the chain store inquiry. That report, like others made by the Commission upon that inquiry, may be judicially noticed.

Swift & Company v. U. S., 276 U. S. text 319, 72 L. ed. text 594; footnote 1;
Standard Oil Co. v. United States, 283 U. S. text 171, 75 L. ed. text 946-947, footnote 6.

The letter of transmittal, dated July 19, 1931, thus defines a "cooperative chain:"

> "A cooperative chain is an association of independent retailers acting cooperatively either by themselves or with a wholesaler to obtain advantages in buying, advertising, or in the performances of other merchandising functions or activities. According to the control of the organization there are two types, the retailer cooperative chain and the wholesaler-retailer cooperative chain."

This is substantially the same definition given for a "voluntary chain" last above quoted from the second report of the American Institute of Food Distribution. The letter of transmittal further states that the scope of the inquiry as to "cooperative chains," included information and data obtained from 319 cooperative grocery chains, with a retail membership of 43,191 independent grocery stores as of the beginning of 1930. The letter also stated that the Commis-

sion estimated there were then (January 1930) in the United States 395 cooperative grocery chains, with an estimated membership of 53,400. As to organization and management, the letter further said:

> "In endeavoring to meet competition as effectively as possible, all types of cooperative chains have attempted in varying degrees to adopt certain policies and methods used by centrally owned chains, relating to uniform features, to managerial services, to supervisors, and in other ways."

The letter then pointed out that the inquiry as to "cooperative chains" had covered "buying and selling methods," "leaders," "advertising," "Private brands," and "financial results." The concluding paragraph of the letter among other things, said:

> "The wholesaler-retailer cooperative is too recent a development to permit any definite conclusion at this time as to which of these two plans of merchandising is more effective in meeting competition . . . . . low cost of merchandise to the retail member is quite probably not the only consideration for the merchandising success of the cooperative chain. The merchandise obtained by the retailer member through the cooperative must be sold by him in competition with other types of retail distributors, and in such merchandising, advertising, store appearance, ar-

> rangement, display, management and supervision are undoubtedly important."

On page 3, footnote 2, and again on page 14, footnote 27, the report proper cites the American Institute of Food Distribution as an authority on "voluntary" or "cooperative" chains, and points out that the Institute's survey as of May, 1930, showed that there were in the United States 551 food voluntary chain organizations, with a total estimated membership of 59,640 retail stores.

At page 6 of the report, it is said:

> "The wholesaler-retailer type of cooperative chain is a group of independent retailers affiliated with a wholesaler for buying, advertising or other merchandising activities."

This definition applies to the "Better Food Stores," described in § XI. of the amended bill.

Page 17 of the report, Senate Document No. 12, presents a table, showing by States the distribution of retail members of food co-operative chains as of January, 1930. Only 26 retail units are reported in Florida, whereas the "Better Food Stores" group, mentioned in § XI. of the amended bill, organized in June, 1931, now has over 250 Florida members in that organization alone.

Pages 18 to 21 of the report discuss the "I. G. A." stores, whose operations in Florida are set forth in the amended bill, R 31 and 32. The amended bill (R 32) alleges:

> "That the selling power of the I. G. A. Organization

> **is very great, as illustrated by the following figures taken from a recent publication:**
> **'During the past year, within a period of one or two weeks, I. G. A. stores have sold 65 carloads of matches, 500 carloads of salt, 100 carloads of toilet paper, 120 carloads of sliced peaches, 150 carloads of macaroni, 4,600,000 of Christmas candy'."**

Page 20, footnote 2 of said report, Senate Document No. 12, shows that the facts so stated in the amended bill, were taken from a pamphlet entitled "Courage to Face the Facts," published in 1930 by J. Frank Grimes, President of the I. G. A. organization.

Pages 50 to 55 of said Senate Document No. 12 discuss food cooperative chain contracts, and forms of such contracts are shown by the appendix. Substantially the same matter is set up in the amended bill, R 30.

Chapter 5, of said Senate Document No. 12, pages 56, et seq. discusses supervision and control of retail members.

Pages 67, et seq. show managerial services to retail members.

Chapter 6 of the report, beginning page 74, discusses buying and selling methods of cooperative grocery chains.

Pages 78 to 83 discuss and point out advantages to members listed as follows: Lower prices; Collective advertising; Improved Store Management; Use of specials; Uniform store appearance; Increasing volume and turnover; Improved competitive position; Exclusive private brands; Improved cooperation; Improved window displays; High quality merchandise.

After having considered the whole field of cooperative grocery chains up to January, 1930, the report, page 180, lists a number of typical responses from retail members, the second, sixth and seventh of which are as follows:

> "2. 'Our group has made it possible for us to secure an equalized price on small purchases, thereby enabling us to do business with a smaller stock and a quicker turnover.' "
>
> "6. Another such retailer is even more specific: 'Life saver. I have one-half the stock I had three years ago, my own brand of goods, more actual cash, no debts, do not fear competition, business growing with no added expense due to proper store management and no costly fixtures.' "
>
> "7. 'The mere idea that I operate a 'chain store' seems to be an asset. Modern store methods and equipment are essential. Business has increased 20 per cent.' "

The data on "voluntary" or "cooperative" chains shown by this Court's record in the Indiana case is very meager as compared with Senate Document No. 12, even as applied to the development of that type of retail distribution up to January, 1930. Hence what we are now pointing out justifies, we think an entirely different conclusion.

The third report by the American Institute of Food Distribution shows much greater progress and much more complete "integration" in voluntary chain organization. In the foreword of that report, dated September, 1930, Mr.

Gordon C. Corbaley, President of the Institute, among other things said:

> "With the distribution of the second publication, in February, 1930, a new note *began to appear in the trade response.* There was less of a tendency to scoff at the inefficiencies of the voluntary chains and much more disposition to feel that here was something that each man had to understand thoroughly if he were to carry on his business intelligently.
>
> "Manifestly, the time had come to put the Food Institute work on Voluntary Chains upon a more intensive basis—to reorganize all of the records to make sure that we had an accurate picture of the entire development and especially to follow the changes appearing in the various organizations.
>
> . . . . . .
>
> "The purpose has been to present a concise picture of the outstanding facts and trends as they now appear—the sort of material that each manufacturer and distributor should have if he is to cooperate effectively with the movement.
>
> "Out of this educational process we hope to speed the period of change and do our part in guiding men through to a more stabilized trade relationship."

In section I. of that report, entitled: "The Purpose of the

Present Food Institute Investigation," it is, among other things, said:

> "The early growth has been largely crude and inefficient; retailers and wholesalers have simply been reaching for something to strengthen their competitive position. . . . . .
>
> "But in *recent months* there has come a realization that all of these efforts are reaching towards one common theory—that men are recognizing the need to abandon some of their individuality, are developing coordination of effort for the purpose of reducing costs through simplifying the wholesale function, and then are following through with joint work to improve retail merchandising.
>
> . . . . . .
>
> The Food Institute staff began, in April, 1930, to make a systematic investigation of what seemed to be the most immediate problems of the *present evolution.*" (Italics ours)

Section II. of that report shows the very thorough manner in which the Food Institute staff pursued its investigation of how voluntary chains operated in the United States.

Section III. of that report shows that as of May, 1930, the Food Institute staff had a definite record of 551 voluntary chains, with an estimated membership of 59,640 retail stores. The distribution of such voluntary chains and the membership therein is shown by table 1, page 8 of that report.

Section IV. of that report shows the three classes of voluntary chains, the most important of which is

> "c. *Wholesaler-sponsored groups*, each organized on the initiative of a wholesale grocer seeking to bring about a more effective combination of wholesale and retail functions through merchandising affiliation with a selected group of retailers."

That class describes the "Better Food Stores" and other such groups mentioned in § XI. of the amended bill.

Section V. of the third report of the Institute is entitled:

> "How Voluntary Chains Are Paralleling the Growth of Centrally-Owned Chains."

Among other things, it is in that section said:

> "Both forms of organization of retail outlets—regular or centrally-owned chain and voluntary chain—have been essentially working toward the same objective, i. e. *the coordination of the supply and selling functions under one control.*" (Italics ours)

In the same chapter, under heading:

> "How Merchandising Progress of Regular Chains Has Been Paralleled by Organization Activities of Voluntary Chains"

we find comparison in buying, management of stores, central supervision, advertising, special deals with manufacturers, private labels, progress into meats, bakery goods, fruits and vegetables, present competitive position, and probable future developments. As before mentioned, parts of that section are quoted in the amended bill, R 33 and 34.

At page 29 of the third report of the Institute, the following subject is discussed:

> "Relationship Between Wholesale Grocers and Their Affiliated Retailers."

On page 30:

> "Conditions in the Contracts."

And in the last half of that page, and page 31, the subject

> "Supervision of Retail Operations"

is discussed. Under that heading, it is, among other things, said:

> "The regular chains have learned that greater efficiency is secured when executive planning, selection of merchandise and the general discharge of the wholesale function is exercised from a central office. . . . . .
>
> "In the *beginning* the retailer groups depended upon meetings of the members and a rather perfunctory contact maintained by circulars from headquarters. . . . . .

> "With the development of more intensive competition it has become increasingly plain during *recent months* that such incidental contact between retailers, and such casual contact by salesmen with retailers, were not sufficient." (Italics ours)

On page 32 of the same report it is further said:

> "The more fully developed voluntary chains sponsored by wholesalers follow regular chain store practice in substituting supervisors for salesmen as the means of education and supervision.
>
> . . . . . .
>
> One of the chief aims of the voluntary chain tie-up is to eliminate the necessity of 'selling' the retailer anything beyond what he needs to serve his trade effectively, and to make the process of securing merchandise as automatic as it is under the requisition system of the regular chain."

In short, that chapter of the third report shows that the "integration" among voluntary chains had even then equalled that of the regular chains. Certainly it had progressed to a point where it could not reasonably be said that there was sufficient difference to warrant a different classification for license taxation purposes. Moreover, as previously mentioned, and as will be hereinafter discussed, *the "integration" of the businesses carried on by nearly*

all of the appellants in this case exists and is enjoyed outside of the State of Florida, and therefore cannot be utilized as a basis for discrimination in Florida license taxes. Pages 36 and 37 of the Institute's third report discusses:

> "Benefits derived by Voluntary Chains from Relations with Manufacturers."

Among other results there listed, as derived from replies obtained from all the grocery voluntary chains then operating in the United States, are: 30 to 50 per cent. reduction in stock; 10 to 50 per cent. increase in volume; a gross profit averaging from 20 to 23 per cent.; elimination of salesmen; regular deliveries; faster turnover; and smaller receivables.

The third report of the Institute covers many other phases in the evolution of voluntary chains. For instance, § VII., beginning page 42, discusses:

> "The Progress of Voluntary Chain Retailers into Handling Bakery Goods, Fresh Meats and Fresh Fruits and Vegetables,"

and it is pointed out that this development had been brought about largely by the demand of the housewife for as little inconvenience as possible in completing her entire food shopping requirements. To meet that demand of the trade, it is pointed out that both voluntary chains and regular chains were rapidly becoming general food stores, which sell not only dry groceries, but bakery goods, meats, fresh

fruits, vegetables, etc., in fact everything desired for the table of the housewife.

Section IX. of the third report is devoted to the subject of

> "Immediate Problems in the Management of the Voluntary Chains."

Section X. discusses:

> "Future Steps in the Evolution of the Voluntary Chains."

Section XI. discusses:

> "The Voluntary Chain Idea in other Forms."

Among other things, it is there said:

> "A new type of grocery chain is in process of building—with necessity and education working together to gradually change the relationship between the affiliated wholesalers and retailers until there arises a voluntary relationship that quite closely parallels the regular chains. . . .
>
> "*Men who formerly cherished their independence and carried that attitude to extremes are coming together on a new basis of association where the wastes in the intermediate*

functions of distribution are being steadily reduced. (Italics ours)

Such, then, was the "state of the art" as of September, 1930.

In December 1932 the American Institute of Food Distribution, still pursuing its studies of the subject, has reported still further progress in voluntary chain organization. Its 4th and latest report shows that the number of voluntary chains in the United States, up to the end of 1931, had increased to 688, as compared with 551 such chains as of May, 1930; also that the number of affiliated retail units had increased to 83,224 stores, as compared with 59,640 as of May, 1930.

As further showing the "state of the art" in Florida at the present time, we have appended under separate cover an "extra" section of the Florida Times Union of Saturday, July 2, 1932, as Appendix B. That "extra" section of Florida's leading newspaper, having a daily circulation of over 50,000 copies, may not be as authoritative as the reports of the American Institute of Food Distribution. Yet if the Court is to be fully advised of the progress of the art in Florida up to within recent months before this case is considered, no other course is open, because the Florida Courts refused to admit any proof, and the showing made by the "Better Food Stores" in that "extra" demonstrates further rapid progress even since the decision by the Supreme Court of Florida on April 4, 1932. Such newspaper data is competent to show economic development.

Frost v. Corp. Commission, 278 U. S. text 549, footnote 35.

The "extra" claims to be the first birthday of the "Better Food Stores," and boasts that within one year that group constitutes

"Florida's Largest Retail Grocery System,"

consisting of 250 stores, distributed throughout the State, as specifically stated on page 3 of the "extra." The "extra" also carries pictures of many of the "Better Food Stores," showing uniform signs over each, character of display, and that, in keeping with the development noted in the Institute's third report, "Better Food Stores" are now general food stores, including meats. On page 3 of the "extra," under the title

"Small Grocery Merchants Are Meeting Competition,"

this group of stores and its wholesaler explain and admit that they are now successfully applying all the best practices of retail distribution in

"mass buying, group advertising, quality foods, and better merchandising, under the Better Food Stores plan."

On page 5 of the "extra" the "Better Food Stores" located in Jacksonville, 50 in number, are specifically listed,

giving the addresses and telephone numbers. As previously mentioned, each of such "Better Food Stores" represents a subtrading center in the Jacksonville area. On pages 6 and 7 of the "extra" is a big birthday advertisement. On page 11 of the "extra," third column, is an article pointing out that the small town grocer has been enabled to compete with the larger store. And finally, on page 12 of the "extra" there is an article entitled:

"Country's Quality Crops Are secured by Over-Sea."

In that article the wholesaler, Lewis-Chitty Consolidated Grocery Company, explains how it does quantity buying, with which to supply the 250 retail units, operating as "Better Food Stores." That it makes a specialty of putting out its canned goods under "Over-Sea" labels; buys pineapple from the Hawaiian Islands, salmon from Alaska, prunes and berries from Oregon, sweet peas from the Great Lakes sections, etc. In short, it claims to buy from the primary sources of supply, and assembles the best quality of goods in its Florida warehouses, for distribution by truck to the retail units in respective territories, thereby enabling the retail units to maintain small stocks, secure a rapid turn over, with all the advantages of chain store operation, less many of the disadvantages of that type of retail operation.

Such being the present "state of the art" as to the operations of "voluntary chains", we respectfully submit that no possible basis exists in Florida at the present time for the discriminatory and unreasonable license taxes im-

posed upon regular chains by the Florida Act in question. The factual situation disclosed by the bill, further supported by subsequent developments now brought to the attention of the Court, demonstrate that the discriminatory and arbitrary license provisions of the Act in question constitute the plainest sort of violation of the due process clause and equal protection of the laws clause of the 14th Amendment.

When the whole field of present day retail distribution is reviewed it becomes apparent that the practices now employed by chain stores in retail distribution, and the practices employed by independents, organized as "voluntary chains," and the practices employed by wide awake single unit independents, all and singular, are conforming to a new order of economic planning promoted and fostered by the Federal Government, and by State governments, particularly since the World War. This is shown by the address of Mr. Hoover, as Secretary of Commerce, on January 14, 1925, partially quoted in the amended bill, R 10 and 11, complaining of widespread economic waste in retail distribution. It is also shown by a book written by Stuart Chase, entitled "The Tragedy of Waste," published in 1925, and we refer in particular to pages 11, 33, 149 and 223 of that book. The same federal activity in economic planning, as applied to retail distribution, is shown by a radio address delivered by Dr. Julius Klein, Assistant Secretary of Commerce, May 4, 1929, in which he advocated the elimination of economic waste in distribution along the same lines as proposed by Mr. Hoover.

See also address of Frederick M. Feiker, Director Bureau Foreign & Domestic Commerce, of the Department of Commerce, made before the Taylor Society, Inc. of New

York City, December 12, 1932, reported U. S. Daily December 13, 1932, page 3, bottom column 3.

The Federal Transportation Act of 1920, § 1 (18) to (21) is another example of a federal effort to eliminate economic waste in transportation, which is closely allied to retail distribution.

Cooperative Marketing Associations, authorized by the legislatures of more than 42 States, is another evidence of the same economic planning, having for its chief object the elimination of waste, and the reduction of the

> "unconscionable spread between what is paid the producer and that charged the consumer."

All of which was reviewed by this Court in the case of

> Liberty Warehouse Company v. Burley T. G. Coop. M. Assn. 276 U. S. 71, 72 L. ed. 473.

The case of

> Lee v. Clearwater Growers Association, 93 Fla. 214, 111 So. 722,

reviewed the Florida cooperative marketing association statute, the chief object of which was to

> "eliminate speculation and waste in such marketing."

The combined result in retail distribution of the ef-

forts made by chain stores, cooperative chains, and independents, in response to the public demand for elimination of economic waste, has been a very great advantage to the consumer public. This fact is well illustrated by exhibit 4 to the amended bill, R 72-A, showing the grocery advertisements put out in Jacksonville, Florida, on September 12, 1931, by chain stores, cooperative chains and independents. A comparison of prices on standard merchandise, described in those several advertisements, will show that the Jacksonville housewife could make her own choice as to what store she would trade in, and get the same benefit of closely competitive prices. It thus appears that when the trends in retail distribution are viewed in their broadest aspects there ceases to be any semblance of a basis for punitive and discriminatory license taxation upon retail distributors, predicated as the Florida Act is, merely upon the number of retail units owned and operated by the same owner.

(4) *Present Economic Conditions -- Falling Prices; Hand to Mouth Buying; Over Night Truck Deliveries for Long Distances; Itinerant Truck Merchants—Give Wide Awake Independents Advantages over Chain Store Retail Distributors, thus demonstrating an Additional Reason why the Florida Penalizing License Taxes on Chain Stores are Void.*

In the last section of this argument we dealt with the "tidal wave" in the organization and development of "voluntary chains." If that argument stood alone it might be urged that such organization was necessary to meet chain

store competition. We now propose to show that such organization is not necessary, but is merely a matter of choice with the individual merchant.

We have shown that retail distribution, particularly during the last several years, has been a state of flux. Such being the case, it becomes necessary to bring our review of economic conditions as nearly up to date as possible—otherwise this court will to a certain extent be passing upon a moot case.

In the first place, recent governmental surveys show that wide awake independents have the advantage.

On June 7, 1932, Dr. Julius Klein, Assistant Secretary of Commerce, addressed the National Conference of Bakery Owners, at Chicago, on the subject:

"The Outlook for Small Business Units,"

and the material parts of his address appear in the U. S. Daily of June 8, 1932, page 1, column 2, and page 3, column 3. The "United States Daily" is a daily mirror of governmental activities. Among other things, Dr. Klein observed that the outstanding advantage of the small concerns over the big fellows in the same field is

> "quick adaptability . . . The advantages of the small concern become even more obvious during a slump or depression."

The Court judicially knows that since 1928 at least a world wide economic depression of increasing acuteness has prevailed in America and other countries.

Atchison Etc. R. Co. v. U. S. 52 S. Ct. 146,
76 L. ed. 273.

The Court also judicially knows that as a consequence the same period has witnessed a continued decline in market prices of food products and all other commodities. In the face of such decline in prices, said Dr. Klein, the "independent" or small operator, by reason of his greater adaptability, has much the advantage.

Again, Dr. Klein says:

> "One of our leading statistical services very justly remarks that 'the massing of resources does not make for success; it is bringing together sound management ability that counts. In many instances it has been demonstrated that management is more effective in small units than in the giant corporations . . . Good management is the crying need.'
>
> There is no questioning the advantages that accrue with the massed power of large-scale operations—quantity purchasing, economies in overhead, cost curtailments in many directions. But the casualty lists of the past two years record all to plainly the blunt fact that the accumulation of mere bulk as such may well result in increased vulnerability, in a clumsy futility of effort, a lack of quick spontaneous capitalizing of new opportunities . . . But in the buyer's market which is prevalent today the frugal consumer is by no means tol-

erant of any hint that he should suit his sharply impaired requirements to the convenience of industry. The smaller production and distribution unit is under far less rigid requirements to adhere strictly to certain fixed lines of corporation policy."

Again, he says:

"The value of direct personal contact on the part of responsible executives with such shifting markets, as is possible with smaller units, has increased immeasurably during these times of uncertainty . . . And in any matching of quality, whether of wares or of service, the smaller operator is by no means helpless. His proximity to the ultimate consumer is not obscured by the intervention of remote must-be-consulted boards and bankers, and other inevitable accoutrements of bigger business. He is, therefore, able to keep step with demand and thus avoid perilous overloading of inventories. Above all, he is able to foster good will, that invaluable but highly perishable essential."

Again, he says:

"The advantages enjoyed by one small plant are nothing new and do not depend on a general depression by any means. But there is no question that those advantages become more

evident during a slump . . . Another feature of the present situation which favors the smaller, independent operator is his ability to accomplish a quicker canvassing of his more unrestricted sales territories, weeding out undesirable and unprofitable accounts, and concentrate upon serving only the paying ones . . . The independent is at liberty to adjust his methods and his stock to these peculiar tastes, moods and predelictions of his clientele . . . Such action on his part will go far to counterbalance the advantage of large-scale operations possessed by the more complicated business organizations whose competition the independent is called upon to meet. This possibility of rendering a pleasing individual service is, perhaps the greatest asset of the independent business man of today.

For these and other reasons, the average observer who looks at the situation impartially cannot but have faith in the future of the small independent business unit of this country. The vast majority of them, possessing a reasonable margin of capital, with native ability and with willingness to work, to utilize new methods, and to take advantage of new conditions, have as great an opportunity for success today as ever in the past—in fact, a greater opportunity, because of the steady advance in our living standards and our buying power . . .

> There are hundreds of agencies, both governmental and private, eager to supply at very low cost all of the paraphernalia of research, the statistical bases of applied efficiency on these problems of better business methods. In that respect the average small independent today is far better served and equipped than was many a mighty corporation but a decade or two ago. He has, furthermore, right before his eyes the experience, the methods of many of his larger competitors. And there is no copyright on good ideas and sound practices in the fundamentals of right management—selective marketing, accurate accounting, knowledge as to selling costs, well-balanced production and distribution, and so forth . . .
>
> The rapidly spreading networks of fine highways all over the country are contributing along similar lines in facilitating his marketing."

These observations by Dr. Klein, who has actively supervised recent governmental surveys in many phases of retail distribution, should be accepted as authoritative. Certainly he must be regarded as an impartial witness.

In substantiation of the analysis given by Dr. Klein, as above quoted, the Department of Commerce has not merely theorized on the subject, or studied surveys made by it in the field, but it has gone further and established model *single unit* grocery stores in different parts of the

country. The results of tests made of such stores in Norfolk, Virginia, and Charleston, South Carolina, are stated in U. S. Daily for June 30, 1932, page 1, column 4, and page 7, column 1. It is shown that the two model stores, operated along improved lines, such as described by Dr. Klein, have produced gross profits as high as twenty to thirty-three per cent. above sixty grocery stores canvassed in South Virginia and in North and South Carolina. Other advantages have been:

> "Greater visibility of stock, increased convenience for clerks and customers, higher efficiency in filling orders, and greater service for wages paid."

It is also said:

> "The Norfolk and Charleston displays followed the principles developed in the Louisville Grocery Survey, made by the organized grocery trades of the country with the cooperation of the Commerce Department."

Thus it appears that the Department of Commerce has been making an intensive study of retail distribution, particularly in the grocery field. So that the address by Dr. Klein of June 7th, above quoted, represents his conclusions, based upon such studies.

These surveys go further and show that in the face of the existing economic depression and falling markets, the

"independent" actually has many advantages over his chain store competitors.

In the second place, falling prices and over night truck deliveries favor independents.

In Harvard Business Review of July, 1928, Vol. 6, pp. 394 to 400, is an article by Fred E. Clark, entitled:

> "The Causes and Results of Hand-to-Mouth Buying."

He points out that the depression of 1920 and 1921, following the World War, gave great impetus to hand-to-mouth buying, because periods of depression are periods of falling prices. Coupled with falling prices (still prevalent), he points out:

> "With quicker deliveries, the size of orders can be cut down . . . Parallel with this improvement in railroad service has gone the rapid expansion of good roads, the use of the motor truck, and now, the airplane. Rapid delivery in small lots or large seems assured for years to come . . . So long as buyers fear large stocks and manufacturers are competing for business, it is not hard to determine who must carry the stocks, and who will plan methods for rapid delivery from these stocks."

What Mr. Clark said in 1928 along these lines is even more pertinent in 1932, after the depression has been in progress an additional four years.

In the Railway Age of September 26, 1931, at page 485, is an article by Russell W. Talbot, of Yale University, subject:

"Why Shippers Use Trucks."

That article was one of a series of surveys on shipments by trucks between New York and Philadelphia. He points out that the foremost reason given for shipping by truck 100 miles from New York to Philadelphia was *over-night delivery;* next in order was saving in shipping cost; next in order was store door delivery; next, easy settlement of loss and damage; and so on, down to a total of ten reasons.

In the Railway Age of November 7, 1931, beginning page 701 is a copy of an address by J. R. Turney, Vice-President of the St. Louis Southwestern Railroad, delivered before the Associated Traffic Clubs of America, at Tulsa, Oklahoma, on October 28, 1931. His subject was:

"The Motor Truck—A Threat and an Opportunity."

Among other things, he said:

"Why is it so easy for the trucks to take our l. c. l. traffic? The answer is not hard to find . . .

So long as our patrons bought seasonably this constant increase in the size of the freight container was an advantage rather than a handicap. But our patrons no longer buy seasonably. *Ours is the day of reduced inven-*

> *tory and hand-to-mouth buying.* Our cars have become entirely too large for the purchase needs of many of our patrons. The result is that our average box-car load is about 50 per cent of its capacity, and it costs us more to haul our box cars than it does the freight they contain. The truck takes the business by affording a flexible container in units of approximately one-fourth carloads . . . The keystone of the success of the truck is that it can and in many cases does consistently give overnight service within a range of 350 miles."

On January 5, 1932, Mr. Leo J. Flynn, Attorney Examiner for the Interstate Commerce Commission in the matter of federal regulation of motor carriers, I. C. C. Docket No. 23,400, made his report, recommending a co-ordinated plan of transportation. His report included fifty proposals for legislation, designed to promote efficiency. These proposals, including comments on the report as a whole, were published in U. S. Daily for January 6, 1932, page 1, column 5; also in New York Times of January 6, 1932, page 1, and in Railway Age of January 9, 1932, beginning page 74. Mr. Flynn's first and second conclusions or recommendations were as follows:

> "1. The national transportation machine cannot function with progressive efficiency, part regulated, part unregulated; co-ordination of transportation agencies cannot

reach its economic possibilities under this anomalous condition.

"2. *The past ten years have been an era of changing methods of distribution, of merchandising, and of business practices; transportation by motor vehicle being one of the greatest contributing factors to these changes.*" (Italics ours.)

As applied to the independent merchants, all of this goes to show that in Florida, as elsewhere, independent merchants are doing hand-to-mouth buying. We have heretofore pointed out that many State paved highways radiate from the City of Jacksonville. Any merchant within a radius of 100 to 200 miles can telephone his order in on the afternoon of any day, and receive an overnight delivery by truck from the wholesale merchants in Jacksonville the next morning. Since the decision by this Court in Smith v. Cahoon, Florida passed an amended motor truck law regulating contract motor carriers, as well as common carrier trucks, but the contract carriers are not regulated as to rates. Hence with the unemployment situation existing, the independent merchants can obtain an overnight delivery by truck almost at his own price of transportation.

If we did not thus avail ourselves of such data as above pointed out, then by the time hearing is reached in this cause the case would be a year or two behind the actual status of economic conditions, and that is the precise reason why this court reversed the decision of the lower Court in the case of

Atcheson Etc. R. Co. v. United States,
284 U. S. 248, 76 L. ed. 273.

The general observations above noted and drawn from authentic sources are beautifully illustrated as applied to Florida, by a letter of an independent merchant doing business at Crescent City, Florida, 80 miles south of Jacksonville, dated October 8, 1932, incorporated in a paid advertisement, appearing in the Jacksonville Journal (one of Florida's leading dailies) of November 12, 1932, as a part of the propaganda put out by "Peoples Opinion, Inc." an organization promoted by the truck interests of Florida. That letter so published, was in part as follows:

"MILLER'S GROCERY, Inc.
Western Meats, Vegetables, Fruits, Candies
Crescent City, Florida
October 8, 1932.

Peoples Opinion, Inc.,
P. O. Box 1622,
Jacksonville, Fla.
Gentlemen:

Have just read an advertisement of yours in the Jacksonville Journal in reference to the trucking situation.

If you will pardon my reminiscing, can't help but recall the old days in the grocery business when the small grocery merchants were compelled to carry large inventories of goods, when we had to plan our wants way in advance, depending on railroad deliveries which incidentally, have not

been speeded up or improved very much along this line even today. Our capital was necessarily tied up in slow articles when we made a mistake in judgment. Our stock of groceries would often spoil before being sold, we were never able to take advantage of fast moving specialties which nowadays pay us handsome profits and permit rapid turn-overs. This has all been made possible by truck deliveries.

For instance, in my case here at Crescent City, I can phone Jacksonville jobbers as late as five P. M. in the afternoon and order out my next day's supply; when my store opens in the morning Crescent City people not only have a fresh stock to select from, but I have only to buy limited amounts and thus reduce my cost of investment, which enables me to spend more money for improvements and pay employees better salaries, and remain in business.

. . . . . .

It is also fearful to think of what would have happened to us during the past two years when every one was laboring under heavy inventory losses because of falling prices, if that merchandise had been coming to us by the old slow method of transportation. It was bad enough with quick truck delivery.

. . . . . .

Very truly yours

Miller's Grocery, Inc.

Geo. C. Miller. "

The foregoing statements are precisely in accord with what has happened in other places, as shown by the articles above quoted and discussed. We have heretofore pointed out, citing exhibit 3 to the amended bill, that there were on September 12, 1931, sixteen wholesale grocery concerns then operating in the City of Jacksonville. We have also pointed out that the Lewis-Chitty Consolidated Grocery Company has now affiliated with fifty retail independents in the Jacksonville area, and two hundred others in other areas of the State, but that wholesaler is only one of the sixteen. The other fifteen must find business among the independent merchants of the State, and so they must necessarily deal with independents such as the Miller Grocery Company, of Crescent City, and send out deliveries overnight, thus enabling the independent merchant to do business on a small capital, maintain a quick turnover, take advantage of specialties, and thereby avoid all the responsibilities of large buying, and all losses incident to falling prices, etc. Such combination of conditions gives the independent merchant the decided advantage. These, coupled with the personal equasion discussed by Dr. Klein in his address of June 7, above quoted, certainly give the wide awake independent merchant more than an even break against his chain store competitor. The large buying power of a chain store concern counts for nothing as against such economic conditions; in fact, is a positive detriment if exercised. His or its integration of a large number of stores operated in Florida and in other States, likewise counts for nothing; the large capital counts for nothing. The opportunity of the independent merchant, on a buyer's market, to buy late in the afternoon what he wishes to sell

on the following day, and have it delivered overnight by truck, at low transportation cost, outweighs all those things said to be favorable to the chain store owner, even if such chain store owner exercised all those functions within the State of Florida.

Such is the "state of the art" now existing, and this Court is entitled to know these things, even though the decision of the Supreme Court of Florida attempted to shut out all opportunity of proof.

In the third place, independents have the advantage in buying from itinerant motor truck merchants.

This is a development in retail distribution which has come about almost entirely within the last two years. So far as we have been able to find no such factor has yet found its way into any decided case, and no university economist has as yet made any study thereof. And yet, as we shall now point out, this development must be considered in order for this Court to be fully informed as to the present "state of the art" in retail distribution.

On January 4, 1932, The Florida East Coast Railway and other Southern carriers filed a Sixth Section Application No. 5123, with the Interstate Commerce Commission, asking leave, pursuant to § 6 (3) of the Transportation Act, to immediately put in force rates on citrus fruits to all Southeastern States below Virginia at a twenty-five per cent (25%) reduction, and to Seaboard States North of North Carolina, at an immediate reduction of eighteen per cent (18%). The special reasons given by the carriers for such immediate reduction in rates on citrus fruits were thus stated in the petition:

"Inroads made by unregulated carriers in the transportation of citrus fruits from Florida have reached the point that it causes much concern to both the shippers and the carriers. Motor trucks are handling a large volume of this business to points in Southern States, more especially to Raleigh, Durham, Winston-Salem, Asheville, N. C., Knoxville, Harriman and Nashville, Tenn. and East of Nashville, Tenn., Birmingham, Montgomery and Mobile, Ala., including the points named. Records available indicate that there were handled from Florida up to and including December 9th by motor trucks 513,053 boxes of citrus fruits, which is equivalent to 1,425 minimum cars of 360 boxes. This much we have a record of moving by motor trucks. The citrus fruit generally handled by motor trucks is that picked up by itinerants and thrown on the market indiscriminately at any price the fruit will bring and creates a condition whereunder the sale of the fruit through regular channels is, to say the least, hampered and also results in depressing the prices received by the growers."

On January 9, 1932, as appears by U. S. Daily of January 11, 1932, page 8, column 2, the Interstate Commerce Commission authorized the 25% reduction as applied for, same to be effective on fifteen days notice, in order to meet the motor truck competition set forth in the petition. The

carriers' proposal for an immediate reduction to Northern points was denied, and the carriers required to give the statutory thirty days notice. In the same item a part of the petition above quoted was set forth.

On January 23, 1932, as appears by U. S. Daily of January 25, 1932, page 6, column 1, the Florida Railroads filed tariffs with the Interstate Commerce Commission, effective February 22, 1932, reducing rates on citrus fruits to Northern points 18%. The same item recited that the Commission had previously allowed the 25% reduction to Southeastern points, but required the 30 days notice to more Northern points.

On January 30, 1932, as appears by U. S. Daily of February 1, 1932, page 1, column 7, the Interstate Commerce Commission, again refused to permit the 18% reduction to Northern points in advance of the statutory 30 days notice. These several proceedings show that as to Southeastern territory these carriers had been practically deprived of all participation in the citrus fruit movement going out of the State, due to unregulated truck competition—itinerant motor truck merchants—and that they were similarly affected, but in a lesser degree, on the Northern part of the Atlantic Seaboard, even as far as Boston.

The extent of the itinerant motor truck traffic out of Florida, in citrus fruits, during the season of 1931-1932, is shown by the following study by the Florida Department of Agriculture, in an item appearing in the U. S. Daily for September 15, 1932, page 2, column 2:

" Florida Studies Movements of Citrus Fruit by Truck

From September through December, 1931, the Florida Department of Agriculture tabulated daily the truck passings of citrus fruits, and says that in this four month period 833,572 boxes of oranges, grapefruit and tangerines moved by truck.

Twenty-seven states other than Florida received these truck shipments. Massachusetts, Michigan, Nebraska and Wisconsin are included in the list, but the States nearer Florida received the largest volume.

According to the volume received, Georgia ranked first, then South Carolina, Alabama and Tennessee. The ranking cities were Atlanta, Savannah, Birmingham, Augusta, Charleston and Greenville.—(Department of Agriculture). "

Such official studies and bulletins by Executive Departments either of the Federal Government or State Government, are competent for consideration by this Court.

Standard Oil Co. v. U. S. 283 U. S. 163, 176, 177, 178; footnotes 11, 14, 16 and 17.

It is common knowledge that the citrus season in Florida is only about half over at the end of December, and the figures contained in the above item take no account of the truck deliveries to Florida points such as Jacksonville and other North Florida cities. Hence the fair conclusion is that the truck movement of Florida citrus fruits during

the 1931-1932 season approximated two million boxes. If the truck movement had practically eliminated railroad traffic in that commodity to all the Southeastern States it is a fair deduction that the truck movement has eliminated railroad traffic to North Florida points as well.

Early in November, 1932, Southern carriers, still unable to regain their traffic in Florida citrus fruits to Southeastern States, still further reduced their rates—this time 35% of the 1931 rates, and even that will not suffice. However, the point here is not the effect on railroad revenue, but instead, on markets and retail distribution.

The citrus fruit trucker buys cull fruit from the packing houses, or buys fruit direct from the grove owner, and then loads the fruit in his truck in bulk, without washing if bought from the grower, and without the expense of wrapping, crating, etc., which aggregates in case of railroad shipments about $1.00 per box. He can still compete with the railroads as to cost of transportation, even since the railroad rates are reduced, so that when he gets to points of disposition he can undersell anything transported by rail, starting as he does, with an advantage of $1.00 per box. The result is that the market in the Southern States for citrus fruits has been killed, except that which moves by truck under chaotic conditions.

It is also a fair deduction that the horde of trucks carrying citrus fruits out of the State would not come back empty if they could profitably come back loaded, and so we may conclude, as is the fact, that a large percentage come back loaded with apples from Virginia, and even as far as Delaware; also corn from the Carolinas; sweet potatoes, syrup, poultry and eggs from Georgia, and so forth. These

commodities are sold by truckers to retail merchants in Florida just as the citrus fruits are sold by them to retail merchants throughout the Southeastern States. Every such itinerant trucker hauling fruit and other commodities is a wholesale and retail merchant, whose place of business is the public highway. It makes no difference to him whether the grocery man to whom he sells his load, or half a load, is an independent single store merchant, or the manager of some unit of a chain store enterprise. All he wants is cash for his load, or part of load, so that he can immediately return to the source of supply for a like performance. In the face of declining prices, in a measure produced by such itinerant truckers, the independent retail store operator again has the advantage for the reason that a part of the requirements of a chain store operation is to buy in sufficient quantities to insure a supply for all of the retail units, and if the price goes down a quantity purchase produces a heavy loss. That element applies to Florida retail merchants, not only in citrus fruits, but as well, to all products of other States brought into Florida by itinerant truck merchant operations.

This itinerant truck merchant development is not local to Florida. On June 13, 1932, the Department of Agriculture of the State of Ohio issued the following bulletin on the same subject:

"Better Farm Products for Ohio Consumers — Better Prices for Ohio Producers

OHIO STATE DEPARTMENT OF AGRICULTURE

COOPERATING WITH
THE UNITED STATES DEPARTMENT OF
AGRICULTURE
I. S. Guthery, Director
DIVISION OF MARKETS
Weekly Bulletin

BULLETIN No. 159 Monday, June 13, 1932.

Every large produce market in the country is passing through periods of demoralizing prices, due to unregulated motor truck transportation. These periods occur with such irregularity that they have practically forced the old law of *supply and demand* out of the picture.

Under the present conditions the problem of maintaining any regular flow of agricultural products from the producer to the consumer is hopeless. There is either a feast or a famine. If it were possible to pass the low price, prevailing on any market, due to heavy unexpected motor truck arrivals on to the consuming public there might be some redeeming features to this picture, however, this is usually impossible for the product forced on to the market suddenly and unexpectedly usually deteriorates before it can pass through the channels of consumption even at prices far below the cost of production. The next day these unregulated trucks bury some other market with an avalanche of products. As a result buyers are continually between the "Devil and the Deep Blue Sea." They don't dare buy when they can and can't when they want to.

The Ohio Division of Markets has no criticism to a regulated economic system of motor truck transportation. For over a year we have been continuously warning our producers of this situation. We have personally warned our agricultural leaders and the menace is increasing instead of decreasing. The Ohio Division of Markets cannot fight this situation single handed.

Ohio's produce markets are in the most demoralized condition they have ever been, and this condition will grow worse in place of better unless supplies can be regulated in a more orderly manner than at present, and this cannot be accomplished unless reasonable and equitable restrictions are placed on our present unregulated system of motor truck transportation.

E. A. Fleming, Chief,
Division of Markets. "

In the midst of this chaos in marketing, the independent merchant, who has gotten into the habit of hand-to-mouth buying, has a big advantage over the chain store owner.

The major part of the Ohio Bulletin was quoted in the Railway Age of July 16, 1932, page 93.

It is common knowledge that the vegetable industry of Florida, and the raising of small fruits, such as strawberries, exist in the southern end of the Peninsula. Therefore, it is fair to conclude that the condition which exists in Ohio relative to all classes of fruits and vegetables and farm products, exist in Florida in the movement of fresh

vegetables, small fruits, etc. from the lower end of the Peninsula to retail merchants in the northern part of the State. In season, itinerant truckers supply Florida merchants with peaches, watermelons, cantaloupes, pecans and other products from Georgia and the Carolinas.

The State of Minnesota is having the same trouble from itinerant motor truck merchants to such an extent that on September 16, 1932, more than four thousand citizens met in the City of St. Paul and formed a "Ship by Rail Association." Proceedings of that meeting are set forth in the Railway Age of September 24, 1932, pages 435 to 437.

Pennsylvania and other eastern States are having the same troubles in the cement industry, and in the marketing of fruits and vegetables. See address by W. W. Attebury, of the Pennsylvania System, Railway Age of April 2, 1932, page 575.

Testimony to the same effect was given by J. R. Van Arnum, Traffic Manager of the National League of Commission Merchants, before the Senate Interstate Commerce Committee, on March 22, 1932, in a hearing upon the Couzens Bill (S. 2793), proposing interstate regulation of motor trucks. See U. S. Daily, March 23, 1932, page 1, column 6. Mr. Van Arnum's testimony appears in Part 3 of the printed hearings on the Couzens Bill, before the Senate Committee on Interstate Commerce, pages 461 to 479.

California's position relative to retail distribution, and also wholesale distribution, of fruits and vegetables, is much like that of Florida. It appears by the U. S. Daily of December 1, 1932, page 1, column 5, and page 6, column 1, that on November 30, 1932, Mr. Dudley Moulton, Director

of the California State Department of Agriculture, read a paper entitled:

> "The Uncontrolled Truck and its Effect on Markets"

before a meeting of the National Association of Commissioners, Secretaries and Departments of Agriculture. He pointed out that the rapid growth in the use of motor trucks for transportation

> "appears to be the most outstanding problem before the fruit and produce trade today."

Also he said:

> "The itinerant truckers are at present the targets of much criticism. They are disturbing factors in the producing sections as well as in the distributing centers. By reason of the depressed business conditions and overproduction in many lines, the itinerant trucker has had the opportunity of operating and of establishing himself on a buyer market; and in the districts where his numbers are many there is little left of any stability in methods of doing business or in price levels. He deals frequently with growers who may have need for ready cash or whose products would suffer a heavy cullage if delivered to a resident shipper for grading along established standards."

It is true that the operations of the itinerant trucker merchants affect only food distribution, but it is also true that a very large part of the food bill consists of fresh fruits, vegetables and country produce. It is further true that food distribution constitutes a very large part of all retail distribution, and hence the disturbed economic conditions created by the operations of the itinerant trucker must be taken into account.

The States might be fully justified in imposing a high license tax on such itinerant motor truck merchants, having no place of business except the public highway, and their actions in so doing might be sustained by the case of

Singer Sewing Machine Co. v. Brickell,
233 U. S. 304,

and that might help to cure some of the evils above pointed out. And the States might adopt other regulations which would tend to stabilize markets, and perhaps save some of the traffic for the railroads, rapidly approaching bankruptcy. But while legislative bodies are taking their time to find such remedies, the independent merchant can each day buy what supplies he needs right at his door in anything which may be offered by such itinerant motor truck merchants, and he can do so to an even better advantage than his chain store competitor can do, for the reasons already mentioned.

A consideration of these recent economic developments, together with many other elements previously discussed, and specifically set forth in the amended bill leads, we think, irresistibly to the conclusion that the arbitrary classifica-

tions and discriminatory license taxes prescribed by the Florida Act in question cannot be sustained consistent with the due process of law clause and the equal protection of the laws clause of the 14th Amendment. No sound basis can be found for holding that independent merchants in Florida are entitled to special protection under the wing of such discriminatory regulations.

(5) *A General Survey of the Factual Situation shows that no Taxable Difference Exists between Appellants and their "Independent" Competitors.*

This topic is made a matter of special treatment in § XIV. of the amended bill, R 37 to 49. That section in general points out that chain store methods of distribution have been adopted to meet changed economic conditions, some of which are set forth in § VI. of the bill, and that the chain stores have simply led the way towards the elimination of waste and duplication in retail distribution, with resultant benefits to the consumers of better merchandise at lower prices. That such methods of distribution are open to all, and have been largely adopted, particularly by "voluntary chains."

That section of the bill, beginning R 39, next takes up each alleged difference mentioned in the majority opinion in the Indiana case, and shows that on account of progress in "the art," and otherwise, such alleged differences and advantages, then found to exist in the Indiana case, are not locally enjoyed by appellants severally in Florida.

As to "quantity buying," it is shown that no advantage accrues to appellants severally from their operations in

Florida. It is shown, for instance, that Cohen Brothers, the largest department store in Jacksonville, and a single store operator, has many times greater buying power than Paxson's Inc. whose business, on a $40,000.00 capital, is described in § XII. of the bill, R 35 to 37. Again, as explained in the third report of the American Institute of Food Distribution, pages 36 and 37, the retail units of "voluntary chains" have no need for large buying power. On the contrary, with the wholesaler at their elbows, and making daily truck deliveries, they are able to cut down their stocks 30 to 50 per cent., handle a greater volume of business, and make a more rapid turn over, with an increased profit of from 20 to 23 per cent. That was the situation in 1930. The fourth report of the American Institute of Food Distribution, released in December, 1932, shows still further results along the same lines.

Such are the Florida facts set up in § XIV. (a) of the bill, R 39, and they are admitted by the motion to dismiss.

It must, of course be conceded that some of the appellants have large buying power, but the bill, R 31, shows that "Independent Grocers' Alliance" has a buying power equal to the largest regular chain. Such buying power is in both cases exercised outside of the State of Florida, and is therefore not pertinent when attempting to determine what is a reasonable non-discriminatory license tax to be paid, either by the "I. G. A. Stores" operated in and near Tampa, Florida, or to be paid by the largest chain operated in different counties of the State.

The same sort of comparisons may be made on the subject of "mass distribution," as specifically alleged in §

XIV. (b) of the bill, R 40. Here again, as previously explained, nearly all of appellants exercise the function of distribution outside of the State of Florida, and, if there be an advantage in that behalf, it amounts to a taxable privilege in the State where exercised. In any event, the State of Florida has no right to seize upon that characteristic as justifying the discriminatory license tax now complained of.

The same may be said as to "buying for cash,"—exercised out of the State—§ XIV. (c).

The same may be said as to "selection of merchandise bought,"—exercised outside of the State—§ XIV. (d).

The same as to warehousing of goods and distribution from a centrally located warehouse, where the warehouse, such as Liggett's New York warehouse is far removed from the State—§ XIV. (e).

As to "prices and sales policy," the amended bill, by means of the advertisements in the grocery line, attached and made a part thereof, shows quite clearly that "independent" stores, especially in the food line, and particularly those operating as "voluntary chains," have an even break with "regular chains." All such stores carry special brands, and rely upon various features to attract the trade. The prices on all standard articles, as shown by the advertisements, especially those in exhibit 4, are highly competitive. And again, if there is anything distinctive about chain store sales policy, most of the appellants determine those policies at some central office far removed from the State.

As to "greater turn over," § XIV. (h) of the bill, R 44. it is clearly made to appear that no advantage exists in

Florida. That section of the bill, considered in connection with § XI. of the bill, R 27 to 35, shows that so-called independent grocery merchants now get their goods by truck deliveries from wholesale grocers, in the same way that chain store units get their goods by truck from the centrally located warehouse. And we have already noted that the third report of the American Institute of Food Distribution, and the birthday "extra" of "Better Food Stores," both point out that the capacity of the affiliated wholesaler to make quick truck deliveries, enables the individually owned members of the voluntary chain to produce equally as rapid turn over as any chain store competitor.

The same observations apply forcibly to the matter of "advertising," § XIV. (i) of the amended bill, R 44. In that section it is shown that some of the appellants do very little, if any advertising. As to others, it is shown that advertising in one town will be of no benefit in another town far removed. For instance, the J. C. Penney Company has a store in each of three different counties. As to the grocery business, exhibit 4 to the bill shows that the "voluntary chains" such as "Better Food Stores," are outstripping the regular chains in the matter of advertising, and if further proof or showing as to this point be necessary, all we have to do is to refer to the entire "extra" section of the State's greatest newspaper, of July 2, 1932, appendix B of this brief. Unified advertising is another feature capable of local application, but it is not peculiar to "chain stores." It can be adopted, and has been adopted, by their competitors.

Like observations may be made as to uniform store arrangement and display. The third report of the Food

Institute and the Better Food Stores "extra", previously referred to, both show that independents now affiliated in "voluntary chains," have made great progress along these lines. If they have not yet equalled the attractiveness of chain stores in the matter of display and arrangement of stocks, etc. it is their own fault. But if we take their own word for it, they have already equalled the chain store units in that behalf. That is precisely what is claimed in the article entitled:

> "Small Grocery Merchants are Meeting Competition,"

page 3 of the "extra," Appendix B. Thus again, we find that practices heretofore credited to chain stores as advantages, are, if capable of local application, open to independents, and are actually being appropriated and utilized by independents.

All of these matters of fact, set up in § XIV. of the bill, like other parts of the bill, are admitted by the motion to dismiss.

Finally, it will not do to urge that a large chain store enterprise, by a combination of its resources and methods, is able to realize a larger per centage of profit from its entire enterprise, exercised in many States, and therefore, cannot complain of a proportionately higher license tax by Florida upon the retail units operated within its borders. One answer is, such attempted justification would be predicated upon income, and Art. IX. sec. 11 of the Florida Constitution, provides:

> "No tax upon . . . the income of residents or citizens of this State shall be levied by the State of Florida or under its authority."

That prohibition against income taxes operates not only against measures which would undertake directly to levy that sort of tax, but as well against those which might seek to accomplish the same result indirectly. And therefore, the license tax in question cannot be tested from an income tax basis. It must be presumed that the Legislature did not intend to fly into the teeth of that State constitutional prohibition. Moreover, if some of the appellants derive large incomes from their entire chain store enterprises, operated in Florida and many other States, it is presumed that the States of their domicile will not let them escape from paying appropriate income taxes, as, for instance, the State of New York, where the head offices of most of the appellants are situated.

The case of

> Cotting v. Kansas City Stock Yards Co.
> 183 U. S. 104, 105,

refutes the argument that successful operation warrants the use of the "legislative scalping knife."

In the case of

> Engel v. O'Malley, 219 U. S. 128, 138,

Mr. Justice HOLMES said:

> "It is true no doubt that where size is not an index to an admitted evil, the law cannot discriminate between the great and the small."

It seems to be going far afield to seek a justification for the Florida Act on account of possible greater profit, or possible greater buying power, or possible more skillful management, because all such matters appear to be extraneous. The Florida Act itself, particular sec. 8, pretends to put aside all such tests, and makes the measure of liability a "store" or a *place* where

> "goods, wares or merchandise of any kind are sold at retail."

Since the Statute itself undertakes to measure the burden imposed by the brackets of § 5, according to the number of *places* in which retail merchandise is sold, it would seem to be irrelevant to set up other supposed bases of justification. But in any event, the amended bill presents a Florida factual situation not heretofore considered by the Court, and that factual situation will not justify the discrimination imposed.

(6) *Authorities Relied upon to Support Point 7.*

As applied to the factual situation presented by the record at bar, we now submit that the dissenting opinion by Mr. Justice BROWN, of the Supreme Court of Florida,

concurred in by Mr. Justice ELLIS, 141 So. pp. 161 to 171, represents the only sound conclusions to be reached in this case. Mr. Justice BROWN, 141 So. text 168, very appropriately points out, quoting from both the majority opinion and minority opinion in the Jackson case, that there is very little disagreement as to the principles of law to be applied—the divergence being in their application to the facts. Mr. Justice BROWN also points out, quite appropriately, we think, that in the face of the admitted facts, the Circuit Court of Leon County was in error in sustaining the motion to dismiss, and that the appellees should have been required to answer.

The Florida record shows that the differences, if any, between chain store practices, and those now utilized by their competitors are inconsequential. Where differences still exist, they concern privileges, or supposed advantages exercised and enjoyed beyond the borders of the State, and, therefore, cannot justify a discriminatory Florida License Act. And so, we come back to the fundamental principle laid down in the Coleman case, 277 U. S. 32, 37, that "mere difference is not enough."

The protection of the 14th Amendment against arbitrary discrimination in matters of business, and in the orderly pursuit of the common occupations of life, as announced in the Coleman case, 227 U. S. 32, and as announced in the case of

Quaker City Cab Co. v. Pennsylvania,
277 U. S. 389,

has come to be recognized through a long line of decisions,

which have followed and applied the reasoning of Mr. Justice FIELD and Mr. Justice BRADLEY in the Slaughter House cases, 16 Wall. 36, and in the Butchers Union Case, 111 U. S. 746. Since the Florida record has made it plain that the purpose and effect of the Florida Statute is, under the guise of a revenue measure, to prohibit or restrict the engaging in common occupations of life, we think it profitable to go back and consider the fundamental doctrines so ably expounded by Mr. Justice FIELD and Mr. Justice BRADLEY, since adopted in many decisions of this Court as ruling principles.

In the Slaughter House cases the Court split on the question of whether or not the Louisiana Act of 1869, creating the slaughter house monopoly in the City of New Orleans, should be regarded as a police measure within the competency of the State, or as a restriction upon a common occupation of life, within the prohibition of the 14th Amendment. The majority, speaking through Mr. Justice MILLER, concluded that the Act must be regarded as a police measure within the competency of the State, affecting the civil rights of its citizens, and that this Court would not set itself up as a "perpetual censor" of such legislation. Mr. Justice FIELD and Mr. Justice BRADLEY took a contrary view, and held that the police regulations provided in the Louisiana Act were merely incidental. That the main object and effect of creating the monopoly was to exclude a great number of citizens from the enjoyment of a very common occupation, a right secured to them by the 14th Amendment. Mr. Justice Field pointed out, text 106:

> "So fundamental has this privilege of every citizen to be free from *disparaging and unequal enactments,* in the *pursuit of the ordinary avocations of life,* been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the Courts." (Italics ours.)

At text 109 and 110, he also said:

> "This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, *all pursuits, all professions, all avocations are open, without other restrictions than such as are imposed equally upon all others of the same age, sex and condition.*" (Italics ours.)

The Louisiana Slaughter House monopoly case was again before the Court in the Butchers Union Company case, 111 U. S. 746. At text 757 Mr. Justice FIELD again said:

> *"The common business and callings of life, the ordinary trades and pursuits, which are inocuous in themselves, and have been followed in all communities from time immemorial, must therefore, be free in this country to all*

> *alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.*" (Italics ours.)

Mr. Justice BRADLEY was equally positive. In 111 U. S. text 762, 763, he said:

> "To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizens, contrary not only to the common right, but, as I think, to the express words of the Constitution . . . The ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, *applying equally to all*, as the general good may demand." (Italics ours.)

As applied to police measures, the doctrine of the majority in the Slaughter House cases is still the rule, but as applied to the right of engaging in the common occupations of life, the dissenting opinions of Mr. Justice FIELD and Mr. Justice BRADLEY in the Slaughter House cases, and in the Butchers Union Company case, have been repeatedly approved.

Allgeyer v. Louisiana, 165 U. S. 578, 589-590;
Gulf Colorado Etc. R. Co. v. Ellis, 165 U. S. 150, 155, 159, 160 and 165;
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 111, 112;
Southern Railway Co. v. Greene, 216 U. S. 400, 412, 417.

In the case of

Truax v. Raich, 239 U. S. 33, 41,

the Court, speaking through Mr. Justice HUGHES, said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

And in support of that doctrine the Court again cited the dissenting opinion of Mr. Justice BRADLEY in the Butchers Union Company case, along with other subsequent decisions. See also:

Meyer v. Nebraska, 262 U. S. 390, 399, 67 L. ed. 1042, 1045.

As applied to the factual situation presented by the amended bill, and presented by the brief, we think that

Point 7 of this argument, stated pages 85-86 supra, is fully sustained by the following more recent decisions:

Louis K. Liggett Company v. Baldridge,
278 U. S. 105, 72 L. ed. 204;
Fairmont Creamery Company v. Minnesota,
274 U. S. 1, 11, 71 L. ed. 893, 898;
Frost v. Corporation Commission, 278 U. S. 515;
Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264;
New State Ice Co. v. Liebmann, 285 U. S. 265,
76 L. ed. 747.

Since the Florida Act does not pretend to be anything more than a revenue measure—in no sense a police regulation—decisions upholding state classifications or regulations as police measures have no relevancy. The sale of groceries, shoes or other merchandise, is a common occupation of life, and the 14th Amendment protects against an arbitrary classification which undertakes to restrict or burdent some of those engaged in such occupations, for the benefit of others; and the State cannot seize upon a mere difference in method of conducting such occupation as justification for such discrimination.

Under the facts as shown by the Florida record, it is not possible, consistent with the doctrines announced in the above line of cases, to justify a statute which will work such arbitrary discriminations as disclosed by tables 1, 2, 3 and 4, presented pages 17 to 19 of this brief. If such a scheme of license taxation can be upheld as applied to places or "stores" where goods, wares or merchandise are sold at retail, then it may be sustained as applied to the taxi cab

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business, and instead of requiring a license fee to be paid by a taxi cab operator based on the size of his business, or the capital stock employed, such business may be arbitrarily loaded down with ascending brackets, such as found in § 5 of the Florida Act, dependent upon the number of taxi cabs operated in a single city, or the number of taxi cabs operated in different cities. Such an Act would be effective to protect the small operator, just as the Florida Act was designed to protect the "independent" merchant. A similar scheme might, in like manner, be applied to the dairy business, and be carried to such extremes as to prevent any dairyman from having more than five dairy cows, or such limited number as the Legislature might by its fiat determine. And thus, step by step, due process of law and the equal protection of the laws, now guaranteed by the 14th Amendment, and embodied in the Declaration of Independence at the time this Nation came into being, would be cast aside, and we would find ourselves back in the Fourteenth Century, when in 1350, the Act of 37 Edward III. was enacted, providing, among other things, as follows:

> "artificers, handicraft people, hold them every one to one mystery, which he shall choose betwixt this and the said feast of the Candlemas, and those who did not so choose and work at the 'one mystery' were punished by imprisonment for half a year and fine and ransom."

In 1899 the then President of the American Bar Association, in his annual address of that year, pointed to that old English Statute as a precedent which might be

resorted to for arbitrary and discriminatory legislation, then being enacted in several states against department stores.

(7) *Anti-Chain Store and Similar Legislation Condemned in Many Cases.*

In the case of

Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204,

a Pennsylvania Statute, designed as a restriction upon chain drug stores, the business of one of the appellants in this cause, was condemned because plainly arbitrary in requiring every stockholder to be a licensed pharmacist. See also:

Great Atlantic & Pacific Tea Co. v. Doughton, (N. C.) 144 S. E. 701, p. 23 supra;
F. W. Woolworth Co. v. Harrison (Ga.) 156 S. E. 904, p. 24 supra.

In the case of

City of Danville v. Quaker Maid, Inc. (Ky.) 278 S. W. 98, 43 A. L. R. 590,

the Court condemned a statute which undertook to discriminate against "cash and carry" stores, based upon the number of employees engaged in such stores. That decision

is a notable example of where "mere difference is not enough."

In the case of

City of Covington v. Dalheim (Ky.) 102 S. W. 829,

the Court held:

> "A tax on grocers where confined to those employing delivery wagons, is invalid."

In City of Seattle v. Dencker (Wash.) 108 Pac. 1086, 28 L. R. A. (N. S.) 446,

it was held:

> "A license tax on the sale of goods of any kind by means of an automatic device is an invalid classification, being based solely on the *mode of sale*, whether by device or hand." (Italics ours.)

In Moffitt v. City of Pueblo (Colo.) 133 Pac. 754, held:

> "There is discrimination between persons of the same class where a license fee is imposed upon those selling goods from any car, warehouse, private house 'or any other place not kept or directly under his control,' but not on

persons who make such sales from a *place owned* or controlled *by the seller.*" (Italics ours.)

In Chicago v. Netcher, 183 Ill. 104, 48 L. R. A. 261, the Court condemned an anti-department store statute of Illinois.

In Missouri v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265,

the Court condemned a Missouri anti-department store statute. The Missouri Court's condemnation was vigorous in terms. Among other things, the Court said of the statute:

"It shows upon its face that regulation is not its purpose, but that revenue or *undue restriction in the interest of others* not embraced in the class designated is the aim and view . . . *Mere legislative assumption of the right to direct* and indicate the channel and course into which the private energies of the citizen shall flow, or the attempt to *abridge or hamper his right to pursue any lawful calling* or lawful avocation which he may choose without unreasonable regulations, have been condemned in all free governments . . . It is truly *'classification run wild.'* It is *special legislation unrestrained.* (Italics ours.)

(8) *Cases Relied upon by Appellees Distinguished.*

The Appellees contended in the Court below that the decision of this Court in the Indiana case and its decision in the North Carolina case were controlling. We have already sufficiently considered the Indiana case as applied to Point 7 now under discussion. The North Carolina case,

> Great Atlantic & Pacific Tea Co. et al. v. Maxwell, 284 U. S. 575,

affirming the decision of the North Carolina Court, reported 154 S. E. 838, has already been mentioned sufficiently to point out material differences between that case and the one at bar. Nevertheless we apprehend that the decision of the North Carolina Court, affirmed per curiam by this Court, will be strongly urged for the appellees. Hence we shall pause here to note differences in the statutory provisions and differences from a factual standpoint. The statute involved in that North Carolina decision was § 162 of Chap. 345, Laws of North Carolina, 1929, amending the statute which was involved in the Doughton case, 144 S. E. 701. The amended section required the payment of a

> "license fee of fifty dollars ($50.00) on each and every store operated in this state in excess of one."

That amendment did away with any retroactive operation of the North Carolina statute, theretofore complained of with respect to the Act of 1927, and the exemption as to one store existed in favor of every store operator in the State. There was no ascending ratio dependent upon the number of stores operated in a single county, or in different counties, as is the case under section 5 of the Florida Act. Again, the North Carolina Court pointed out (154 N. E. 840-841) other material provisions of the Constitution and statutes of North Carolina. For instance, it was pointed out that the Constitution of North Carolina was amended in 1920, providing that the total state and county tax on property should not exceed fifteen cents (15c) on the $100.00 valuation, and further that

> "The State Tax shall not exceed five cents on the one hundred dollars value of property."

These provisions, the Court pointed out, were a substantial change in the state policy since pursued

> "of raising revenue required for state purposes, by taxing trades, professions and franchises and incomes, leaving to the counties and municipalities of the State, for their support, the tax on property, real and personal."

The Court next observed that section 443 of Chap. 345, Laws of North Carolina, 1929, provided that

> "No ad valorem tax on any property in the state shall be levied for any of the uses of the State."

That provision was passed, as the Court observed, in pursuance of the new State policy put in force by the Constitutional Amendment of 1920. By that section of the Revenue Act of 1920, along with the amendment in section 162, above cited, stocks of goods carried by multiple store owners were fully and completely relieved of state ad valorem taxes, no matter how many such stocks of goods were carried in different retail units. The $50.00 per store license tax on all stores in excess of one, was in its nature *in lieu* of a state ad valorem tax. The Court next observed that taxes for State purposes levied by Chap. 345, Laws of 1929, were (1) Taxes on Inheritances; (2) License taxes on trades, professions and occupations; (3) Taxes on Franchises; (4) Taxes on Incomes. In Florida we have an ad valorem tax on stocks of merchandise, but we do not have any tax upon incomes, the same being prohibited by Constitutional provision (Art. IX. § 11). The North Carolina income tax applies equally to single store owners as to multiple store owners, and thereby tends to equalize the tax burden. This was the ground upon which the Virginia warehouse tax was sustained in the case of

> Great Atlantic & Pacific Tea Co. v. Morrissett, 58 Fed. (2) 991,

discussed pages 43 to 45, supra. Again, by § 153 of the Act of 1929, North Carolina Counties could not levy any

license tax, such as that provided in § 162 for State license taxes. And so, when all those statutory provisions of North Carolina were taken into consideration, there did not appear to be any such unreasonable and arbitrary distribution of tax burden as is provided for under the Florida Act. The situation was practically reduced to the question of whether or not, in view of all the taxing statutes of North Carolina, applicable to retail merchants, the State could, as a reasonable exemption allow one store of every retail merchant to be free of the *State* license tax. The North Carolina Court in substance answered yes, and this Court affirmed its decision.

It has several times been held by this Court recently that a license tax or excise tax may be sustained, if *in lieu of* an ad valorem tax, or other form of taxation, but might not be, if both forms are imposed.

Hopkins v. Sou. Bell Telephone Co.
275 U. S. 393, 72 L. ed. 329;
Great Northern R. Co. v. Minnesota, 278 U. S. 503,
73 L. ed. 477.

The State license tax involved in the Maxwell case, supra, could have been sustained on that theory, if no other. But such is not the case in Florida, because, as already mentioned, Florida has not only an ad valorem tax on stocks of merchandise carried, but the Act now under attack, by the last clause of § 5, imposes an additional license tax of $3.00 per $1,000.00 on the stock carried in retail units and warehouse. On top of all this, § 11 of the Florida Act adds additional county and municipal license taxes.

Counsel for appellees will doubtless urge the case of

Metropolis Theatre Company v. Chicago,
228 U. S. 61.

In that case the City of Chicago passed an Ordinance which provided that

> **"if it be *intended* to produce, offer or present entertainments of the first class,"**

and the highest price of admission is $1.00 or more, the license fee should be $1,000.00; and further that if the highest price of admission exceeded 50 cents, but was less than $1.00, the annual license fee should be $400.00. It is at once apparent that the ordinance was prospective in operation, and theatre owners thereafter had the choice of charging the higher admission fee or the lower, according as best suited their business requirements; whereas here the appellants had no such choice. They were already doing business within the State before the Act under attack was passed, and its provisions became automatically applicable, regardless of what action they might take, other than to abandon their businesses already established.

In the Court below counsel for appellees relied upon a number of police regulation cases, as for example,

Brown Foreman Company v. Kentucky,
217 U. S. 573,

involving the business of rectifying spirits; and

Armour Packing Company v. Lacey, 200 U. S. 226,

involving packing houses—the operation of meat packing houses, and the protection of health; also

Quong Wing v. Kirkendall, 223 U. S. 59,

involving a Montana Act, imposing a license fee upon all persons engaged in the laundry business, other than steam laundries, with a proviso that it would not apply to women so engaged where not more than two women were employed—obviously, a health regulation, in connection with a license tax.

In all such cases a great deal more latitude is allowed to a State Legislature or to a municipality, but in the case at bar, there is admittedly no police feature involved, and hence the question recurs upon the proposition that the Legislature may not, consistent with the 14th Amendment, create arbitrary classifications and glaring inequality of treatment among persons engaged in the same useful calling, such as selling groceries, dry goods or shoes.

The majority opinion of the Supreme Court of Florida, 141 So. 153, 157, 159, is largely predicated upon cases clearly distinguishable. For example, the case of

Toyota v. Hawaii, 226 U. S. 184, 57 L. ed. 180.

First of all, the 14th Amendment does not apply to territories of the United States.

Farrington v. Tokushige, 273 U. S. 284, 299.

Furthermore, it appears that the classification there involved was predicated upon population and difference in value of the privilege. We have many such similar statutes affecting the amount of license fees in the State of Florida, based upon population. See Revised General Statutes of Florida, § 808, automobile agencies; § 822, auctioneers; § 860, laundries; § 891, florists; § 900, gas plants; § 972, shows. But in all such cases the license fee is regulated by the population of the place where the business is conducted, and there is no provision for increase of fee to be paid in one place simply by reason of the fact that the owner operates a similar business in other places in the same County, or in different counties.

The majority opinion of the Supreme Court of Florida, 141 So. 159, also cited

> Pacific American Fisheries v. Territory of Alaska, 269 U. S. 269.

That was clearly a police regulation, because Congress, through its delegated agency, the territorial legislature, had the power to use the license tax, not only to raise revenue, but to restrict the industry, and thereby conserve a *natural resource*. The opinion says:

> "To prevent the territory from doing away with all protection in a short sighted rush for fish."

It thus appears that the statute was designed primarily for the protection of game and fish.

All such cases stand in a class by themselves, as lately recognized by the majority opinion of this Court in

New State Ice Company v. Liebmann,
285 U. S. 262, 76 L. ed. 747.

Counsel for appellees also relied upon Ohio Oil Co. v. Conway, 281 U. S. 146. The Conway case involved a severance tax on oil graded according to gravity, and it was shown in evidence that the value of the oil was graded according to the same gravity—hence gravity was an appropriate and fair means of graduating the severance tax.

It may be that counsel for appellees will cite the last South Carolina Chain Store decision, i. e.

Southern Grocery Stores, Inc. v. South Carolina
Tax Commission, 55 Fed. (2) 931,

referred to in the majority opinion of the Supreme Court of Florida, R 120. First of all, it appears by the opinion that § 1 of the latest South Carolina Statute adopts the scheme of § 5 of the Indiana Statute, and merely extends that scheme to very much higher brackets; whereas, as we have seen, the Florida Statute is hydra-headed—containing several kinds of discriminations. In the next place, the decision of the 3-Judge Court in the South Carolina case was predicated upon a bill praying for injunction against the enforcement of the Act. The opinion indicates that the attack was made primarily upon the face of the Act, and that the bill did not undertake to present any such factual situation as is presented by the amended bill in the Florida

case. As we have seen, the factual situation is all important. Finally, it is to be observed that the 3-Judge decision was rendered on February 2, 1932, and this Court's decision in

Matthews v. Rogers, 284 U. S. 521, 76 L. ed. 447,

was rendered on February 15, 1932. When the decision in the Matthew case was called to Judge Parker's attention he entered a revised order in the South Carolina case, dismissing the bill without prejudice, because, as he interpreted the Matthews case, the Court had no jurisdiction. Thereupon the complainants paid the South Carolina taxes, and forthwith sued at law in the District Court to recover the taxes so paid. That suit at law is still pending, awaiting the outcome of this appeal.

Counsel for appellees may also cite the case of

Penney Stores, Inc. v. Mitchell, 59 Fed. (2) 789,

decided July 7, 1932. The Mississippi statute involved in that case was wholly unlike the Florida Statute, though admittedly directed against the operation of chain stores. The complainant in that suit (not J. C. Penney Company) was the owner of nine grocery stores all owned and operated in the City of Meridian, Mississippi. From that standpoint the case was much like the Indiana case, where Jackson owned and operated all of his grocery stores in Indianapolis. Testimony was taken, but the record even then does not present such a factual situation as is presented by the amended bill at bar, and as presented by this brief. Finally, the Mississippi Statute discriminating against chain

stores was actually repealed on June 1, 1932, by Chap. 91, Laws of Mississippi, 1932, for which reason the decision of the 3-Judge Court, on July 7, 1932, involved a moot question, except as to taxes already payable. The State of Mississippi compromised as to taxes due, and for that reason the appeal to this Court was dismissed by stipulation of counsel in case No. 481, on November 14, 1932, 77 L. ed. (Adv. 147). Such being the outcome of the Mississippi case, there is now in that State no discriminatory statute whatsoever against chain stores.

When we get back to cases that involve what purport to be revenue measures only, the lines against discrimination and arbitrary burdens of taxation are sharply drawn.

Louisville Gas & E. Co. v. Coleman,
237 U. S. 32, 37, supra.

Without extending a review of the decided cases, we respectfully submit that, as applied to the factual situation presented by the amended bill, sub-sections (1), (2), (4), (6), (8) and (10) of Section 5 of the Florida Act, cannot be sustained, consistent with the due process clause and the equal protection of the laws clause of the 14th Amendment.

Point 8.

DAY IN COURT DENIED.—The Supreme Court of Florida Erred by its majority Opinion in Predicating its Judgment upon alleged Judicial Notice, in disregard of the Sworn Facts set up in the Amended Bill and Petitions of Intervention,

admitted by Appellees' Motion to Dismiss, thereby depriving Appellants Severally of their Day in Court—Contrary to the Due Process Clause of the 14th Amendment.

This is a re-statement of the ninth and sixteenth assignment of error, R 174 and 176.

The same point was also presented as points 9 and 10 respectively, pages 13 and 15 of the "Jurisdictional Statement" heretofore filed in this cause.

The matter here complained of is what the Supreme Court of Florida itself did. Complaint as to that matter was first made in § I. of the Petition for Rehearing filed before the Supreme Court of Florida, pages 1 to 5, R 148 to 153. The majority opinion, R 115, (141 So. 158), among other things, said:

> "It is common knowledge that the chain store possesses many distinguishing features that give it an advantage over the independent store dealing in the same commodities. Its method of integration for purposes of co-operative buying, community advertising, traffic in 'selling talk,' displaying, serving the public, unqualified control of wholesaling and retailing, and commanding capital, could under no circumstances become available to the independent store with such results as flow therefrom to the chain store."

It thus appears that the Supreme Court of Florida, speaking through its majority, disregarded the sworn facts set up in the amended bill, and admitted by the motion to dismiss. The factual situation so presented, as we have previously pointed out herein, showed, at least prima facie, that no justifiable basis of discrimination existed between appellants' stores and the stores of single unit owners. The showing so made, as we have pointed out, consists not merely of the pleader's conclusions, but of concrete facts existing in the State of Florida, and illustrated by sundry exhibits attached to and made a part of the amended bill. Notwithstanding all this, the majority opinion, as the quotation last above shows, stated a hypothetical case of its own as constituting the distinguishing characteristics of a chain store. By so doing, the appellants were deprived of all opportunity to meet any such hypothetical case by proof. In short, they were stated out of Court, without any opportunity to be heard.

In discussing the factual situation under Point 7, pages 86, et. seq., supra, we demonstrated, not only from sworn facts set up in the amended bill, but also from economic studies published since the decision of the Supreme Court of Florida, that changes in practices of retail distribution have been moving rapidly. For one thing, that the evolution of the "voluntary chain" has been progressing over the United States like a "tidal wave;" and yet, in the face of such rapidly changing factual situation, the majority of the Supreme Court of Florida, by process of alleged judicial notice, has set up a judicial edict, comparable to a legislative fiat, with no opportunity to be heard, and from which,

in the nature of things, there can be no appeal. We say no appeal, because no means are available by which to test or limit the scope of inquiry supposedly resorted to by the Supreme Court of Florida as a predicate for its alleged judicial notice. We maintain that such a decision carries the doctrine of judicial notice far beyond any legitimate boundary, and operates to deprive the appellants severally of their property without due process of law, contrary to the due process clause of the 14th Amendment.

The right of appellants to complain of such action on the part of the Supreme Court of Florida itself seems to be well sustained by the decision of this Court in the case of

Brinkerhoff-Faris Tr. & Sav. Co. v. Hill,
281 U. S. 673, 74 L. ed. 1107,

third and fourth headnotes (L. ed.) reading as follows:

> "A violation of the due process clause may be accomplished by the state judiciary in the course of construing an otherwise valid state statute."
>
> "The Federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."

The "law of the land" (due process) said Mr. WEBSTER in the Dartmouth College case, "hears before it condemns—proceeds upon inquiry, and renders judgment only

after trial." The Webster definition has been many times approved by this Court. For example, the case of

Hovey v. Elliott, 167 U. S. 409, 418.

In the recent case of

Manley v. Georgia, 279 U. S. 1, 73 L. ed. 575,

the Court held as stated in the second headnote (L. ed.) as follows:

> "A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the 14th Amendment to the Federal Constitution."

In support of the third headnote, the Court speaking through Mr. Justice BUTLER, said:

> "Mere legislative fiat may not take the place of fact in the determination of issues, involving life, liberty or property."

The same doctrines were reiterated in the case of

Heiner v. Donnan, 285 U. S. 312, 76 L. ed. 772.

In the case of

Sterling, Governor of Texas v. Constantin, 287 U. S. ——, decided December 12, 1932,

this Court held that the fiat of a State Governor is not the "Supreme Law of the Land"—that a State Governor cannot by executive order regulate the lawful use of private property.

Arbitrary power thus denied to a state executive and to a state legislature is equally denied to a state judiciary.

Brinkerhoff-Faris T&S Co. v. Hill, supra.

Life, liberty or property cannot be disposed of either by executive or legislative fiat or judicial edict.

We will next inquire what are the limitations of the doctrine of judicial notice?

This question is answered by the leading case of

Brown et al. v. Piper, 91 U. S. 37, 42, 43,

and cases which have followed it, such as Circuit Judge TAFT'S decision in

American F. C. Co. v. Buckskin Fibre Co., 72 Fed. 508, (6 C. C. A.) 2 h. n.

The Court may judicially notice matters of general knowledge and may refresh the judicial memory

"by reference to any printed source of general information known to the court to be reliable."

But "This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon

the subject should be resolved promptly in the negative."

The printed sources of information cited under Point 7, such as reports of the Federal Trade Commission, Senate Documents Nos. 100, 30 and 12, and the American Institute of Food Distribution reports, government bulletins, etc. are known by this Court to be reliable. They show that the "requisite notoriety" did not exist to justify the pronouncement of the Supreme Court of Florida, quoted page 206, supra. *If all the matters so stated* by the *Supreme Court of Florida were then notoriously known to everybody, and no longer open to pleading and proof, then the Federal Trade Commission has wasted large sums of money, and over four years time, investigating those very matters, and their investigation is not yet complete.*

Moreover, if the pronouncement of the Supreme Court of Florida is right then all the studies and surveys of retail distribution made in the last several years by the U. S. Department of Commerce, were in like manner wasted effort. Many of such surveys have been cited and quoted in this brief.

In the case of

Bronk v. Chas. H. Scott Company, 211 Fed. 338, (7 C. C. A.)

the Court held as stated in the second headnote:

"Where a bill by its own averment states a prima facie case, it cannot be dismissed by the chancellor on the ground that he judicially

> knows of facts that would support an answer, unless his judicial knowledge is so broad that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill."

In the opinion to which that headnote refers the Court, among other things, said:

> "This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on a demurrer to the bill."

The action of the Supreme Court of Florida was exactly contrary to what the Court in the Bronk case declared to be the right of the appellants.

In the case of

United States v. Wilson, 7 Peters 150, 161,

this Court, speaking through Chief Justice MARSHALL, said:

> "The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the Judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages."

That decision was rendered in 1833, 100 years prior to the consideration of this case—yet we submit, that the doctrine there laid down is still good law, and shows the error made by the majority opinion of the Supreme Court of Florida, in undertaking to dispose of this case by using judicial notice to outweigh the admitted facts set up in the pleadings, which facts are now further supported by additional matters known by this Court to be reliable.
In the case of

Arkansas v. Kansas & Texas Coal Co.
183 U. S. 185, 190,

the Court, speaking through Mr. Chief Justice FULLER, said:

> "And to judicial knowledge, the principle applies 'that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them.'"

The same doctrines were declared by this Court in

Interstate Commerce Commission v. L&N R. Co.,
227 U. S. 88, 93, 57 L. ed. 431, 434.

Also in the case of

Chaselton Corporation v. Sinclair, 264 U. S. 543,
549, 68 L. ed. 841, 844.

In the Sinclair case, the Court, speaking through Mr. Jus-

tice HOLMES, noted that the Court might dispose of the case from its own judicial notice, but added:

> "Here, however, it is material to know the condition of Washington at different dates in the past. Obviously, the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here."

Instead of proceeding in that manner, the Supreme Court of Florida assumed to dispose of this case in a summary fashion on the basis of judicial notice, as previously explained.

The case of

> First National Bank v. Anderson,
> 269 U. S. 341, 354, 70 L. ed. 295, 305,

is a further illustration. That case involved a state statute discriminating against national bank stock, and the question turned upon the use of capital by state banks in competition with that used by national banks. The State Courts, from which appeal was taken, assumed to dispose of the case by resorting to judicial notice much after the same fashion as did the majority of the Supreme Court of Florida. Concerning that matter, the Court, speaking through Mr. Justice Van Devanter, said:

> "As the case now stands, we think no effect can be given to what the state court assumes is the practice of banks in rural portions of

> Iowa in making farm loans as agents of their customers or others. *If there be such a practice it is not a matter which may be noticed and given effect without pleading or proof.* If followed by some banks, it may not be followed by others." (Italics ours.)

So here, the amended bill undoubtedly shows, particularly § XIV. thereof, that the practices used by chain stores themselves are by no means universal. Again, that section of the amended bill, as well as other sections heretofore discussed, show that improved methods of retail distribution, in which chain stores have participated, are not only capable of adoption, but have been adopted by "independent" merchants, and by such "voluntary chains" as "Better Food Stores", McKesson drug stores, and others. Moreover, we have shown by the bill and economic data discussed in this brief, that methods of retail distribution have been undergoing constant change, both on the part of chain store merchants, and so-called "independent" merchants and "voluntary chains." Finally, it has been pointed out that many functions of appellants severally are exercised outside of the State, and, therefore, have no taxable relation to the State of Florida. We, therefore, submit that the court erred, and that all factors of the situation should be carefully developed and weighed. The appellants were denied that right, and we, therefore, submit that the Supreme Court of Florida, by the action complained of, deprived them of due process of law, contrary to the 14th Amendment.

We respectfully submit that the 9th and 16th assignments of error, R 174 and 176, are severally well founded, and that the action of the Supreme Court of Florida complained of in those two assignments, is itself sufficient to require a reversal.

CONCLUSION

At pages 10 and 15 of this brief we stated a summary of the points involved in this argument, and prefixed to this brief we have attached a subject-index and synopsis of the entire brief. By glancing at the synopsis, or by glancing at the summary of the argument, the several matters complained of can be readily and quickly reviewed.

The Florida Act is unlike any other chain store act previously considered by this Court, or previously considered by any other Court. The Florida Act embraces all the different kinds of discriminations which the ingenuity of anti-chain store advocates could suggest. In addition to the differences in the statutory provisions, the amended bill in this case, admitted by the motion to dismiss, presents a factual situation entirely different from any factual situation previously presented to this Court, and in dealing with an economic question, which is in rapid process of change, the factual situation is all important.

We submit that, as applied to the factual situation, the several discriminatory parts of the Act are severally void; that when the invalid discriminatory portions are eliminated the remainder will constitute a result unwork-

able, and not intended by the Legislature, and, therefore, the entire Act must be condemned. That the Act also operates to discriminate against appellants as citizens of other States; that the Act burdens interstate commerce conducted by appellants; that the Comptroller's discriminatory administration of the Act is void; and that the Florida Supreme Court erred in basing its judgment on judicial notice, in disregard of sworn and admitted facts, and contrary also to what this court itself judicially knows.

The total result is that the appellants severally remain subject to the prior license law, which is § 926 Revised General Statutes of Florida, now § 1197 Compiled General Laws, a part of which was quoted page 38 supra. It is clear, therefore, that the several assignments of error are well founded, and that the decision and judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

THOMAS B. ADAMS,
Counsel for Appellants.

Kay, Adams, Ragland & Kurz,
Of Counsel.

APPENDIX A

CHAPTER 15624

AN ACT Requiring Licenses for the Operation, Maintenance, Opening or Establishment of Stores in this State; Prescribing the License and Fees to be Paid Therefor, and the Disposition Thereof, and the Powers and Duties of the Comptroller of the State of Florida and the Tax Collectors of the Several Counties of the State in Connection Therewith, and Prescribing Penalties for the Violation Thereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That from and after the first day of October, A. D. 1931, it shall be unlawful for any person, firm, corporation, association or co-partnership, whether foreign or domestic, to operate, maintain, open or establish any store in this State without first having obtained a license so to do from the Comptroller of the State of Florida or the Tax Collector of the county in which the same is located as hereinafter provided.

Section 2. Any person, firm, corporation, association or co-partnership desiring to operate, maintain, open or establish a store in this State shall, if the store or stores be all operated within the same county, apply to the Tax Collector of such county, or if more than one store is to be operated and all such stores are not located in the same county, then to the Comptroller of the State of Florida, for a license so to do. The application for a license shall be

made on a form which shall be prescribed and furnished by the Comptroller of the State of Florida and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license; the name of such store, the location, including the street number of such store, and the full actual value of the stock of goods, wares, merchandise and commodities from which sales are to be made, including all goods, wares, merchandise and commodities owned by the applicant and held in storage to be sold in or through such store, and such other facts as the Comptroller may require. Such application shall be under oath. If the applicant desires to operate, maintain, open or establish more than one such store, all such stores for which the applicant desires to secure licenses may be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by a license fee as prescribed in Section 5 of this Act.

Section 3. As soon as practicable after the receipt of such application, the Tax Collector or the Comptroller, as the case may be, shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination, the Tax Collector or Comptroller, as the case may be, shall find that any such application is not in proper form, and does not contain the necessary and requisite information, he shall return such application for correction. If the application is found to be satisfactory and if the filing and license fee as herein prescribed shall have been paid, the Tax Collector or Comptroller, as the case may be, shall deliver to the applicant a license for each store for which an application for a license shall have been made. Each licensee

shall display the license so issued in a conspicuous place in the store for which such license is issued.

Section 4. All licenses shall be issued so as to expire on the 30th day of September of each calendar year. On or before the first day of October of each year, every person, firm, corporation, association or co-partnership having a license shall apply to the County Tax Collector or Comptroller of the State of Florida as the case may be, for a new license for the twelve calendar months next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the Comptroller of the State of Florida. No license shall lapse prior to the 31st day of October of the year next following the year in which such license was issued, and if by such 31st day of October an application for renewal license has not been filed, the Tax Collector or Comptroller, as the case may be, shall notify such delinquent license holder thereof by registered mail, and if application is not made for a renewal license on or before the 10th day of November, next ensuing, the Tax Collector or Comptroller, as the case may be, must collect, in addition to the license fee hereinafter provided, twenty-five per cent of the license tax provided in this Act before issuing the license. The continuation of the business after the expiration of the time limited in the previous license shall constitute a binding agreement on the licensee to pay such penalty. Each such application for renewal license shall be accompanied by filing fee of fifty cents and by the license fee as prescribed in Section 5 of this Act.

Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or

maintaining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act.

The license fees herein prescribed shall be as follows:

"(1) Upon one store, the annual license fee shall be Five Dollars for each such store.

(2) Upon two stores or more, but not exceeding fifteen stores, where the same are located in any one county, the annual license fee shall be Ten Dollars for each such additional store.

(3) Upon two stores or more, but not to exceed fifteen stores, where the same are located in different counties, the annual license fee shall be Fifteen Dollars for each such additional store.

(4) Upon each store in excess of fifteen, but not to exceed thirty, when all are located in any one county, the annual license fee shall be Fifteen Dollars for each such additional store.

(5) Upon each store in excess of fifteen, but not to exceed thirty, where the same are located in different counties, the annual license fee shall be Twenty Dollars for each such additional store.

(6) Upon each store in excess of thirty, but not to exceed fifty, where all are located in any one county, the annual license fee shall be Twenty Dollars for each such additional store.

(7) Upon each store in excess of thirty, but not to exceed fifty, where the same are located in different counties, the annual license fee shall be Thirty Dollars for each such additional store.

(8) Upon each store in excess of fifty, but not to exceed seventy-five stores, where all are located in any one county, the annual license fee shall be Thirty Dollars for each such additional store.

(9) Upon each store in excess of fifty, but not to exceed seventy-five, where the same are located in different counties, the annual license fee shall be Forty Dollars for each such additional store.

(10) Upon each store in excess of seventy-five, where all are located in any one county, the annual license fee shall be Forty Dollars for each such additional store.

(11) Upon each store in excess of seventy-five, where the same are located in different counties, the annual license fee shall be Fifty Dollars for each such additional store.

In addition to the above amounts, Three Dollars for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store."

Section 6. Each and every license issued prior to the first day of April of any year shall be charged for at the full rate, and each and every license issued on or after the first day of April of any year shall be charged for at one-half of the full rate as prescribed in Section 5 of this Act.

Section 7. The provisions of this Act shall be construed to apply to every person, firm, corporation, co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership

or ultimately controlled or directed by one management or association of ultimate management.

Section 8. The term "store" as used in this Act shall be construed to mean and include any store or stores of any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. Provided, however, the term "store" shall not include filling stations engaged exclusively in the sale of gasoline and other petroleum products.

Section 9. Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Twenty-five Dollars nor more than One Hundred Dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

Section 10. Any Tax Collector knowingly issuing a license to any person when false statements have been made in the application for such license without requiring the correction of such false statement and issuing the license in accordance with the corrected application, and any Tax Collector who knows of any person liable for license tax imposed by this Act or who transacts business without such license in violation of this Act, without giving written notice of such facts to the prosecuting officer whose duty it would be to prosecute such offender, and any prosecuting officer whose duty it would be to prosecute any person for the violation of this Act, after having received written notice from the Tax Collector of the failure of such person to

procure a license, (unless the investigation of such prosecuting officer shall disclose that such person was not liable for such tax), shall be subject to removal from office, and it shall be the duty of the Governor to remove him from office.

Section 11. A County license tax of twenty-five per cent of the State license tax shall be levied and imposed upon each store as herein defined and each incorporated municipality of the State of Florida is authorized to levy a municipal license tax of twenty-five per cent of the State tax imposed by this Act, provided that the tax levied by or for the several counties and municipalities shall be graduated only on the number of stores situate in such county or municipality, respectively, notwithstanding the applicant may own other stores beyond the limits of such county or municipality, as the case may be. In all cases coming within this Section of this Act, where the license must be obtained from the Comptroller of the State of Florida, the county and municipal taxes shall be paid by the applicant to the Comptroller and immediately remitted to the proper officers of the several counties and municipalities of the State.

Section 12. All licenses provided for in this Act shall be issued by the County Judges of the several counties of the State of Florida and turned over to the Tax Collector of their respective counties and the Comptroller of the State of Florida, to be issued and delivered to the licensees upon the payment of the license tax herein provided; provided, however, that before any such license shall be issued and delivered by the Comptroller, or any Tax Collector in the State of Florida, the same shall be countersigned by the

Comptroller or Tax Collector, as the case may be.

Section 13. The County Judge of each county shall be entitled to a fee of Twenty-five Cents for each license issued by him, which shall be paid out of the filing fee herein provided for.

Section 14. All laws and parts of laws in conflict herewith are hereby repealed. This Act shall take precedence over any other Act passed by the Legislature of the State of Florida, at the session of 1931, which may appear to be in conflict herewith, and shall be in full force and effect notwithstanding any provisions of any other Act or part of Act.

Section 15. If any section, provision or clause of this Act shall be declared invalid or unconstitutional, or if this Act as applied to any circumstances shall be declared invalid or unconstitutional, such invalidity shall not be construed to affect the portions of this Act not so held to be invalid or the application of this Act to other circumstances not so held to be invalid.

Section 16. This Act shall take effect immediately upon its becoming a law.

Became a law without the Governor's approval on July 3, 1931.

APPENDIX C

AN ORDINANCE OF THE CITY OF WEST PALM BEACH, FLORIDA, IMPOSING A TAX UPON BUSINESS, PROFESSIONS AND OCCUPATIONS ENGAGED IN OR CARRIED ON EITHER WHOLLY OR IN PART WITHIN THE CORPORATE LIMITS OF SAID CITY, FIXING THE AMOUNT OF SAID TAX FOR THE FISCAL YEAR BEGINNING OCTOBER 1, 1932, AND FOR EACH SUCCEEDING YEAR FOR PERSONS, FIRMS OR CORPORATIONS ENGAGING IN SAID BUSINESSES, PROFESSIONS AND/OR OCCUPATIONS AND MAKING IT UNLAWFUL FOR ANY PERSON, FIRM OR CORPORATION TO ENGAGE IN ANY BUSINESS, PROFESSION OR OCCUPATION WITHIN SAID CITY WITHOUT PAYING THE SAID TAX AND OBTAINING A LICENSE THEREFOR AND PROVIDING A PENALTY FOR ENGAGING IN ANY SUCH BUSINESS, PROFESSION OR OCCUPATION WITHOUT FIRST PAYING SUCH TAX AND OBTAINING SUCH LICENSE AND FOR OTHER PURPOSES.

BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA:

SECTION 1. That a tax be and is hereby imposed upon every business, profession and occupation engaged in or carried on either wholly or in part within the corporate limits of the city of West Palm Beach, Florida, in the respective amounts hereinafter set forth and that every person, firm, association or corporation engaged in, or carrying on, managing or practicing any business, profession or occupation either wholly or in part within the corporate

limits of said City, be and is hereby required to pay to the City of West Palm Beach, Florida, a tax in the amount hereinafter designated; that the amount of said tax specified hereinafter shall be on the basis of one year but licenses shall be issued as follows: All licenses shall expire on the 30th day of September of each year. No license shall be issued for more than one year; and for each license obtained between October 1st and April 1st the full tax for one year shall be paid, except as hereinafter provided for, and for each license obtained between April 1st and July 1st, One-half the full tax for one year shall be paid except as hereinafter provided for, and for each license obtained between July 1st and September 30th, one-fourth the full amount of tax for one year shall be paid, except as hereinafter provided for: That upon payment of said tax the Tax Collector of the City of West Palm Beach, Florida, shall issue to the person, firm or corporation paying the same, a receipt or license signed by the said Tax Collector which receipt or license shall expire at the end of the period for which the same is issued as hereinabove specified.

Section 2. That the amount which shall be paid by the several firms, persons, associations or corporations engaging in or managing such respective businesses, professions or occupations, be and the same are hereby fixed as follows:

Merchants, retail, (provided license shall permit but one location) when the average value of stocks of goods carried are as follows:	
Not exceeding $1,000.00	$10.00
More than $1,000.00 for each additional $1,000.00 or fraction thereof	1.50

Where more than one store is owned or operated in said City, by the same person, company, corporation or partnership, there shall be charged in addition to the foregoing sum $25.00 for the second such store, $50.00 for the third such store and $50.00 each for all stores in excess of three.

I, Florie Barnes, Deputy City Clerk of the City of West Palm Beach, Florida, do hereby certify that the above and foregoing is a true and correct copy of certain portions of that certain Ordinance passed and Adopted by the City Commission of the City of West Palm Beach, Florida, on the 28th day of September, A. D. 1932.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Official Seal of the said City to be affixed this the 6th day of December, A. D. 1932.

FLORIE BARNES,
Deputy Clerk.

(SEAL)

FILE COPY

JAN

SUPREME COURT OF THE UNITED STATES

October Term, 1932

No. 301

LOUIS K. LIGGETT COMPANY,
a Corporation, et al.,
Appellants,

vs.

ERNEST AMOS, as Comptroller of
the State of Florida, et al.,
Appellees.

APPENDIX B
TO
BRIEF FOR APPELLANTS.

THOMAS B. ADAMS,
Counsel for Appellants.

KAY, ADAMS, RAGLAND & KURZ,
Jacksonville, Florida,
Of Counsel.

Florida Press, Jacksonville, Fla.

Only the Country's Are Secur

Canned Goods Do Not Come fro Year, But from the State That Each Year; Policy Assures Ov the Nation's Crop.

In recent years the public has come to their labels. They don't accept the clerks is something just as good. This has been br tising and creating a demand for a particular of the brand have endeavored to make the the customer and how well they have succ watching a customer walk through a store an stand for quality.

Perhaps no name or brand is more high of Florida and South Georgia than the familia for A-1 quality without any compromise. O canned goods and other

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FILE COPY

JAN 4 1933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 301.

LOUIS K. LIGGETT COMPANY, a corporation *et al.*,

Appellants,

—against—

ERNEST AMOS as Comptroller of the State of Florida *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF FLORIDA TO THE SUPREME COURT OF THE UNITED STATES.

BRIEF FOR APPELLANT LOUIS K. LIGGETT COMPANY.

ROY M. STERNE,
Counsel for Appellant,
Louis K. Liggett Company.

THE COURT PRESS, INC.

(Corrections for figures on pages 8, 9 and 10 an

The tabulations shown on pages 8, 9 and 10 fa
brackets, and the figures for taxes on stores in
read as follows:

If in one county

No. of stores	Tax per store	Total
10	9.50	95.
20	11.00	220.
30	12.33	370.
40	14.25	570.
50	15.40	770.
60	17.83	1070.
70	19.57	1370.
80	21.50	1720.
100	25.20	2520.
200	32.60	6520.

The first two paragraphs of page 11 should be

Viewed in terms of the opening of one additi
picture.

15 stores in one county, to open one additional
30 " " " " " " "
50 " " " " " " "
75 " " " " " " "
100 " " " " " " "
200 " " " " " " "

The reason for these extraordinary results is
store) go from $10.00 each for stores under 16 in
30 stores in two counties; from $15.00 each for
$30.00 each for 31 to 50 stores in two counties;
in one county to $40.00 each for 51 to 75 stores
stores over 75 in one county to $50.00 each for s

and 11 of brief.)

fail to take into consideration the lower
in one and more than one county should

If in two counties.	
Total Tax	Tax per store.
140.	14.00
315.	15.75
515.	17.16
815.	20.37
1115.	22.30
1515.	25.25
1915.	27.35
2365.	29.56
3365.	33.65
8365.	41.82

be as follows:

itional store you get the following

al store in another county, costs $90.00.
" " " " " $175.00.
" " " " " $385.00.
" " " " " $645.00.
" " " " " $895.00.
" " " " " $1895.00.

is that the taxes (except for the first
in one county to $20.00 each for 16 to
or from 16 to 30 stores in one county to
s; from $20.00 each for 31 to 50 stores
es in two counties; from $40.00 each for
r stores over 75 in two counties.

INDEX.

PAGE

Nature of Case 1
Official Report of Opinion below 1
Statement of Case 1
Florida Act
Definition of store 2
Graduated taxing provisions 2
Points and Summary of Argument 5
Argument
The County Line Discrimination—a new type of arbitrary taxation 7
The Factual Situation 15
Some Economic and Legal Consequences of Chain Store Tax Legislation and Decisions 31

1. General 31
2. Lack of relationship between tax liability and test of classification has led to arbitrary discrimination 36
3. Taxation and classification by intangible personal attributes 40
4. All competitive stores favored over chain stores without regard to existence of distinctions or advantages 41
5. Merchants who open a second or additional stores do not thereby place themselves in a new trade or calling 46

Conclusion 48

CASES CITED:

PAGE

Butchers Union Co. v. *Crescent City Co.*, 111 U. S. 746 14

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282..... 30

German Alliance Insurance Co. v. *Home Water Co.*, 226 U. S. 220..... 30

Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494. 14

Jackson v. *State Board*, 283 U. S. 527.....11, 29, 31

Kentucky Finance Corporation v. *Paramount Exchange Corporation*, 262 U. S. 544..... 14

Metropolis Theatre Co. v. *Chicago*, 228 U. S. 61..... 46

Poindexter v. *Greenhow*, 114 U. S. 270..... 30

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389... 14

Quong Wing v. *Kirkendall*, 223 U. S. 59..... 30

Weaver v. *Palmer Bros.*, 270 U. S. 402..... 30

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No. 301.

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Appellants,

—against—

ERNEST AMOS, as Comptroller of the State of Florida, *et al.*,

Appellees.

BRIEF FOR APPELLANT LOUIS K. LIGGETT COMPANY.

This brief is presented on behalf of the Appellant, Louis K. Liggett Company.

A. Nature of the Case. The case involves the constitutionality of an occupational license tax statute applying to merchants, prescribing discriminating license fees according to the number of stores owned and according to whether the stores are located in one county or in more than one county.

B. Official Report of the Opinion below.

The opinion of the Supreme Court of Florida, concurred in by four justices, together with the dissenting opinion of two of the justices of that court, will be found in 141 So. Rep., pages 153 to 171.

C. Brief Statement of the Case.

The legislature of Florida passed an act, Chapter 15624, Acts of 1931, also called "State of Florida Chain Stores License Tax," which became a law without the Governor's signature on July 3, 1931.

This act is an occupation tax statute applying to merchants, requiring a license for the privilege of owning or operating a store or stores in the State of Florida, graduated in an ascending scale according to the number of stores owned, and providing a new and unique type of discrimination, based on county lines alone, so that higher amounts (ranging from fifty per cent. to twenty-five per cent.) are required if the stores are located in different counties than for the same number of stores located in one county.

The term "store" is defined in Section 8 of the statute as follows:

> "The term 'store' as used in this act shall be construed to mean and include *any store or stores* of (or?) any mercantile establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, *in which goods, wares or merchandise of any kind are sold at retail.*" (Italics ours.)

Section 5 of the act is as follows (italics ours):

> "Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act.
>
> The license fees herein prescribed shall be as follows:
>
> "(1) Upon one store, the annual license fee shall be Five Dollars for each such store.

(2) Upon two stores or more, but not exceeding fifteen stores, where the same are located in any one county, the annual license fee shall be Ten Dollars for each such additional store.

(3) *Upon two stores or more, but not to exceed fifteen stores, where the same are located in different counties, the annual license fee shall be Fifteen Dollars for each such additional store.*

(4) Upon each store in excess of fifteen, but not to exceed thirty, when all are located in any one county, the annual license fee shall be Fifteen Dollars for each such additional store.

(5) *Upon each store in excess of fifteen, but not to exceed thirty, where the same are located in different counties, the annual license fee shall be Twenty Dollars for each such additional store.*

(6) Upon each store in excess of thirty, but not to exceed fifty, where all are located in any one county, the annual license fee shall be Twenty Dollars for each such additional store.

(7) *Upon each store in excess of thirty, but not to exceed fifty, where the same are located in different counties, the annual license fee shall be Thirty Dollars for each such additional store.*

(8) Upon each store in excess of fifty, but not to exceed seventy-five stores, where all are located in any one county, the annual license fee shall be Thirty Dollars for each such additional store.

(9) *Upon each store in excess of fifty, but not to exceed seventy-five, where the same are located in different counties, the annual license fee shall be Forty Dollars for each such additional store.*

(10) Upon each store in excess of seventy-five, where all are located in any one county, the annual license fee shall be Forty Dollars for each such additional store.

(11) *Upon each store in excess of seventy-five, where the same are located in different counties, the annual license fee shall be Fifty Dollars for each such additional store.*

In addition to the above amounts, Three Dollars for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store.' "

The complainants, owners of two or more stores, located in different counties, sought through their amended bill of complaint (R. 2 to 76), filed in the Circuit Court of Leon County, Florida, to restrain the enforcement of the act, and to have it declared invalid because arbitrary and unconstitutional. The bill set out facts affirmatively showing that no basis exists for discrimination or for classifying appellants' stores differently from the stores of merchants favored by the act, and particularly and in detail denied the existence of any facts or grounds of difference warranting discrimination or different classification. As it will be necessary in the argument to discuss at some length the facts set up in the amended bill, in order to avoid burdening the court with repetition we respectfully refer the court to the amended bill of complaint on pages 2 to 76 of the record, and particularly to Sections II, III, IV, VII, VIII, IX (R. 22 erroneously numbered XX), X, XI, XII, XIV (which we particularly stress), XV and XVI; also to the petitions for intervention, pages 79 to 101 of the record.

Appellees filed a motion to dismiss the amended bill (R. 77) which motion was granted by the Circuit Court (R. 101). The case was appealed to the Supreme Court of Florida, and there affirmed (R. 148, R. 159); and it is from the final decree of the Supreme Court of Florida that this appeal is taken. The motion to dismiss admitted the facts set forth in the amended bill; yet the Supreme Court of Florida by its action, refused to hear the complainants, and thereby deprived them of their day in court.

Points and Summary of Argument.

This appellant relies principally upon two points, First, the county line discrimination, which we firmly believe requires that the act be declared void on its face; and secondly, the failure of the lower court to hear the appellants on the factual situation set up in the bill, and admitted by the motion to dismiss. These points for purposes of focusing the discussion may be stated as follows:

POINT I.

An act which imposes a greater privilege tax per store on several stores located in two or more counties than on the same number of stores located in one county,—there being no basis for the discrimination or classification, and no distinction between the stores other than that in one case all the stores are in the same county and in the other case one or more of the stores may be located in a different county from the remaining stores,—is arbitrary and unreasonable.

POINT II.

(a) Where a bill of complaint sets up facts affirmatively showing that no basis exists for discrimination or for classifying complainants' several stores for occupational license taxes differently from unit stores, and particularly denies the existence of any facts or grounds warranting discrimination or different classification as between multiple stores and unit stores, the complainants have a right to show by their evidence that discriminations in a state occupational license statute are arbitrary and unreasonable; and the granting of a motion to dismiss, which motion admits complainants' averments, is error.

(b) The action of the Florida courts in sustaining a motion to dismiss complainants' bill charging arbitrary discrimination in taxation and denying the complainants' right to be heard on the facts pleaded in their bill and admitted by the motion, denies to complainants their day in court, and deprives them of their property without due process of law.

(c) The Florida courts did not have the right to substitute assumed judicial notice for the sworn facts pleaded in complainants' bill and admitted by the motion to dismiss, but should have allowed the complainants the opportunity to be heard on their evidence, instead of dismissing the bill on motion.

Argument.

POINT I.

The County Line Discrimination.

It may be well before proceeding with the argument to get a perspective of the situation by asking, What is a store? The occupation taxed is that of keeping a store—and a store as defined includes *any place* where goods or merchandise of any kind are sold at retail. Therefore, a store may be any place whatsoever, of whatsoever size and dealing in whatsoever commodities. It may occupy a space 10 x 10, deal in cigars, chewing gum and candy bars, and do a business of $10 a day; it may be a soft drink stand dealing in soda pop and sandwiches; it may be a haberdashery store or a small apparel store doing $20,000 to $50,000 a year volume; it may be a clothing store, or any other type of store doing a business of a hundred or two or three hundred thousands of dollars annually; it may be located in a poor section, or be a country village convenience store; it may be a choice corner located in the busiest section of a city; it may be a one-story general merchandise place, or it may be a ten-story affair occupying a city block, containing thousands of square feet, and doing a business of millions of dollars a year; it may have a stock of a few hundred dollars, or it may carry merchandise whose value runs into hundreds of thousands, or even millions of dollars. There is in the statute no distinction based upon any standard of any kind; if it sells any merchandise at retail, it is a store.

The State of Florida has undertaken to tax all such places; and if a person owns two or more such stores, large, small or medium sized, valuable or worthless, they are taxed at the ascending rates set forth in the statute.

But the Florida statute goes much further than this. If a merchant has his stores located in one county, he pays

one rate, but another and much higher rate if the stores happen to be located in different counties. It may be much easier to operate two or more stores located in a single city in a single county, from the standpoint of supervision, delivery of goods, and in other respects, than if the stores were in different counties; nevertheless, if the merchant opens his second store in a different county or already has a store in a county different from the county in which his other stores are located, his tax rises on a rapidly ascending scale; while his competitor with the same number of stores in one county pays a much lower rate.

The working out of the brackets of the Florida act (using for convenience 10 store graduations), gives result as follows: (Note, for the first store the tax is $5.00.)

On ten stores in one county, the nine stores over one pay $10.00 each, or $90.00, total for the 10 stores $95.00 or $9.50 each; on ten stores, nine in one county, one in another, the nine stores over one pay $135.00, total for the 10 stores $140.00 or $14.00 each. The percentage increase tax in the stores over one is 50% for having stores in different counties.

On 20 stores in one county, $15.00 for each store in excess of one or $285.00 for the 19 stores, total $290.00 or $14.50 per store; on 20 stores, 19 in one county, one in another county $20.00 for each store over one or $380.00 for the 19, total for the 20 stores $385.00 or $19.25 per store. The percentage increase in the tax on stores over one is 33⅓% for having stores in different counties.

On thirty stores in one county, $15.00 for each store over one, or $435.00 for the 29, total $440.00 for the 30, or $14.66 per store; on thirty stores, 29 in one county, one in another county, $20.00 for each store over one or $580.00 for the 29, total for 30 stores $585.00 or $19.50 per store.

On forty stores in one county, $20.00 for each store over one or $780.00 for the 39 stores, total for the 40 $785.00 or $19.62 per store; on 40 stores, 39 in one county, one in

another, $30.00 for each over one, or $1,170.00 for the 39, total for the 40 $1,175.00 or $29.37 per store. The percentage rate of increase on stores over one is 50% for having stores in different counties.

On fifty stores in one county, $20.00 for each store over one or $980.00 for the 49, total for the 50 stores $985.00 or $19.70 per store; on fifty stores, 49 in one county, one in another county, $30.00 for each store over one or $1,470.00 for the 49, total for 50 stores $1,475.00 or $29.50 per store.

On sixty stores in one county, $30.00 for each store over one or $1,770.00 for the 59, total for sixty $1,775.00 or $29.58 per store; on 60 stores, 59 in one county, one in another county, $40.00 for each store over one or $2,360.00 for the 59, total for the 60 $2,365.00 or $39.42 per store. The percentage rate of increase for having stores in more than one county is 33⅓%.

On seventy stores in one county, $30.00 for each store over one, or $2,070.00 for 69 stores, total for 70, $2,075.00 or $29.64 per store; 70 stores, 69 in one county, one in another county, $40.00 on each store over one or $2,760.00 for the 69, total for 70 stores $2,765.00 or $39.50 per store.

On eighty stores in one county, $40.00 for each store over one or $3,160.00, total for 80 $3,165.00 or $39.56 per store; on 80 stores, 79 in one county, one in another county, $50.00 for each store over one or $3,950.00 for the 79, total for 80, $3,955.00 or $49.43 per store. The percentage rate of increase for having stores in different counties is 25% in this bracket.

One hundred stores in one county would carry tax of $3,965.00 or $39.65 per store; one hundred stores in two counties would carry a tax of $4,955.00 or $49.55 per store.

Two hundred stores in one county would carry a tax of $7,965.00 or $39.82 per store; 200 stores in two counties would carry a tax of $9,955.00 or $49.77 per store.

A recapitulation of the above gives the following table:

	If in one county		If in two counties	
No. of stores	Tax per store	Total tax	Total tax	Tax per store
10	9.50	95.	140.	14.00
20	14.50	290.	385.	19.25
30	14.66	440.	585.	19.50
40	19.62	785.	1175.	29.37
50	19.70	985.	1475.	29.50
60	29.58	1775.	2365.	39.42
70	29.64	2075.	2765.	39.50
80	39.50	3165.	3955.	49.43
100	39.65	3965.	4955.	49.55
200	39.82	7965.	9955.	49.77

The arbitrary nature of the county line discrimination is graphically visualized when you consider the above tables in relation to two merchants: one who has all his stores in one county, and the other having stores in two or more counties. The one-county merchant is greatly favored by the lower taxation, and an arbitrary penalty put on all merchants for having or opening stores in more than one county.

The arbitrary nature of this discrimination is further shown by the fact that the higher rates become retroactive on all stores in a single county, if an additional store is opened in another county.

If a merchant has 15 stores in one county he pays $145.00 for his stores, $5.00 for the first and $10.00 for each of the others; if he has 14 stores in one county and has or opens another in a different county, he pays $5.00 for his first store and $15.00 for each of his other 14, or 50% additional per store (over one) merely because he opens one in a different county. In other words, the higher tax applies not only to the one in the new county, but reacts so as to make the tax higher in all other stores. And so on through the brackets.

Viewed in terms of the opening of one additional store you get the following picture:

14 stores in one county, to open one additional store in another county, costs $80.00.

15 stores in one county, to open one additional store in another county, costs $160.00.

30 stores in one county, to open one additional store in another county, costs $465.00.

50 stores in one county, to open one additional store in another county, costs $1020.00.

75 stores in one county, to open one additional store in another county, costs $1530.00.

100 stores in one county, to open one additional store in another county, costs $1040.00.

200 stores in one county, to open one additional store in another county, costs $2040.00

The reason for these extraordinary results is that the tax (except for the first store) goes from $10.00 for each of 15 stores in one County to $20.00 for each of 16 stores in two Counties, increasing per store 100%; from $15.00 for each of 30 stores in one County to $30.00 for each of 31 stores in two Counties, increasing per store 100%; from $20.00 for each of 50 stores in one County to $40.00 for each of 51 stores in two Counties, increasing per store 100%; from $30.00 for each of 75 stores in one County to $50.00 for each of 76 stores in two Counties, increasing per store 66-2/3%.

It will be seen that having or opening one store in one additional county causes every bracket along the line to go up.

This county line discrimination goes far beyond the reason and intent of the opinion in the Indiana chain store tax case (*Jackson* v. *State Board, etc.*, 283 U. S. 527). If a merchant has fifteen stores, and opens a sixteenth, the

Indiana case permits the tax on the sixteenth store to be greater than for the other fifteen.

The Florida statute goes further in three respects when the sixteenth store is in a separate county: First, it provides that the rate of taxation shall go up once because it is the sixteenth store, and second, that it shall go up again because it is in another county; and third, the Florida law requires that all the other fifteen stores shall be taxed an additional amount per store because the one store is in another county.

It is well settled, we believe, that the Legislature could not prohibit a person from carrying on a common calling in more than one county; and it may not classify him for taxation for so doing except upon some reasonable basis. No reasonable ground appears why a storekeeper with fifteen stores in one county should have his tax raised on those fifteen stores because he opens a sixteenth in another county; nor does any reasonable ground appear for taxing differently one merchant who has sixteen stores in one county from another merchant having the same number of stores in two counties.

It would also appear that under the Florida statute, a storekeeper could have his taxes increased by the action of the Legislature in subdividing one county into two.

Under the reasoning of the Indiana decision, as we understand it, the heavier burdens upon the storekeeper are allowed, not because of the number of stores he has, but because the possession of a number of stores is understood to make him a different kind of merchant from the storekeeper with one store. He certainly does not, however, become still a different kind of merchant because one or more of his stores may be located in a different county from the others.

In the case of each of the appellants and intervenors, their licenses are largely added to because of the county line discrimination. Thus the Liggett Company, with 22 stores

pays $355.00 against $250.00 which it or a competitor would pay with a like number of stores in one county; and if an additional store should be added the taxes on all the other stores would also go up.

The natural effect of such county line discrimination is to discourage merchants from doing business in more than one county, or opening additional stores; and to penalize them heavily for doing so.

It is to be borne in mind at all times that the merchant having stores in two counties pays more than a merchant having a like or greater number of stores in one county on each of the stores in the same county, and also a larger amount on the additional stores in the other county or counties.

It will also be recalled at all times that these are taxes for revenue based on the privilege of storekeeping. The equal protection of the law is denied to the merchant who has stores in a county paying more per store than another merchant with the same or a greater number of stores in the same county. There is nothing but a bald, arbitrary discrimination against him, and he is deprived of his property without due process.

The entire Florida act is framed on the basis of the county line distinction. If the court attempted to strike out the brackets applying to stores in different counties, there would be left a statute which applied only to stores all located in one county. If the court attempted to strike out the brackets applying to stores in the same county there would be left a statute applying only to stores in different counties. In either of these cases, a purely arbitrary discrimination would result, in addition to the fact that the statute would be a different one from that passed by the Legislature. If the court attempted to strike out the brackets applying to different counties, and the words "when all are located in the same county" in the remaining

brackets, or if the court attempted to strike out the brackets applying to stores in the same county, and the words "where the same are located in different counties" in the remaining brackets, it could not be determined what rate of taxation was intended by the Legislature; and in either event the court, it seems to us, would be rewriting the statute for the Legislature.

The legal principles applying to taxation of this character are well settled. All persons are entitled to the protection of the guarantee of equal laws provided by our constitution and while a state may of course adjust its legislation to essential differences in situations, the classification must be reasonable, not arbitrary, and must rest upon distinctions having a logical and substantial relation to the object sought to be accomplished by the legislation; and persons circumstanced alike must be treated evenly and equally. *Kentucky Finance Corporation* v. *Paramount Exchange Corporation*, 262 U. S. 544; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494.

The act does not bear equally upon the merchant who has all his stores in one county and the merchant who has the same number of stores in different counties.

The oft quoted words of Justice Field in *Butchers Union Company* v. *Crescent City Co.*, 111 U. S. 746, seem here so pertinent as to bear repetition. In that case it is said that among the inalienable rights of our citizens "is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial, must,

therefore, be free in this country to all alike upon the same terms. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." In the same case Justice Bradley's language holds to the clear light of the principle "that the liberty of pursuit, the right to follow any of the ordinary callings of life is one of the privileges of a citizen of the United States;" of which he may not be deprived and in which he may not be discriminated against without violating the guaranties fundamental in our constitution.

It therefore appears, we respectfully submit, that the entire Florida act is unconstitutional and void on its face.

POINT II.

The Factual Situation.

But if the Florida statute does not fall as a whole because of the county line discrimination, we respectfully submit that the court below should have allowed appellants to prove the facts set forth in the amended bill of complaint, and particularly in subsections (a) to (o) of Section XIV (R. 39 to 49).

In the Indiana Chain Store tax case, as we understand it, this court was careful to hold that the mere possession of a number of stores was not sufficient foundation for a discrimination between unit store merchants and multiple store merchants; and that the discrimination must rest upon other factors and elements sufficient to set apart and distinguish the multiple or chain store merchant from the unit store merchant. Indeed the simplest illustration is sufficient to show that mere number of stores cannot possibly be used as a distinguishing characteristic. Clothing

store Merchant A owns three stores, located on the corner of First Street, Third Street and Fifth Street on the east side of Grand Avenue. Each store does a business of $30,000.00 per annum, occupies a space of 1,000 square feet, and carries a stock of $6,000.00 of merchandise; a total business of $90,000.00 per annum, in a total store space of 3,000 feet, containing stocks aggregating $18,000.00. Clothing store Merchant B has a store located on the west side of Grand Avenue at the corner of Third Street. This store occupies 6,000 square feet of space, carries a stock of $30,000.00, and does a business of $200,000.00 per annum. Each sells partly for cash and partly on credit, spends the same amount for advertising, sells approximately the same brands of merchandise. Obviously Merchant A through the mere possession of three stores enjoys no advantages that Merchant B does not possess. To tax Merchant A $25.00 for the privilege of operating his business as a clothing merchant, $5.00 for the first store, and $10.00 for each of the others, while Merchant B pays $5.00 to enjoy exactly the same privilege would be obviously arbitrary. Therefore, if there is a difference between merchants in the same line of business sufficient to support a tax discrimination, it must be found in some essential distinction in the type of occupation. This does not mean that the distinction may be based on mere form of organization, such as that one merchant is a corporation or partnership, while the other is an individual. This court has many times held that such distinctions cannot be used for occupational license discriminations.

The term "chain store operator" is a loose one, and for occupational purposes means very little. A merchant is in the furniture business, drug business, clothing business, etc., and his experience in a drug chain would not be of any value to the furniture business. About the only patent distinction between a merchant who operates one store and the one in the same line of business who operates several

stores (aside from the fact that the first has one and the second more than one store) is that all except the first store must be handled through agents; and this would be true even of the one-store merchant if the business is owned by a corporation.

So in arriving at distinguishing factors between single stores and multiple stores, the court adopted testimony delivered by Prof. Rawles for appellants in the Indiana case, which the court summarized as follows:

> "The appellants produced evidence to prove that there are many points of difference between chain stores and independently owned units. These consist in quantity buying, which involves the application of the mass process to distribution, comparable to the mass method used in production; buying for cash and obtaining the advantage of a cash discount; skill in buying, so as not to overbuy, and at the same time keep the stores stocked with products suitable in size, style and quality for the neighborhood customers who patronize them; warehousing of goods and distributing from a single warehouse to stores; abundant supply of capital, whereby advantage may be taken of opportunities for establishment of new units; a pricing and sales policy different from that of the individual store, involving slightly lower prices; a greater turnover, and constant analysis of the turn-over to ascertain relative profits on varying items; unified, and therefore cheaper and better advertising for the entire chain in a given locality; standard forms of display for the promotion of sales; superior management and method; concentration of management in the special lines of goods handled by the chain; special accounts methods; standardization of store management, sales policies and goods sold.
>
> "The appellants' evidence indicated that all of these advantages are interrelated and interdependent in the chain store business. The witnesses conceded

> that some of them may be found in large independent grocery or drug stores or the like, but they did not, as appellee claims, state that all of them combined, exist therein, as in chain stores."

To support the discrimination as we understand the decision, it is not sufficient that a mere number of stores be owned, but the separately classified taxpayer must in actuality have differences and distinctions, if he is to be discriminated against and the discrimination upheld. It would not matter how many stores a merchant owned if he did not have the asserted advantages or differences. If multiple store owners do not have such advantages, or unit store owners do have them, it would be, as we understand, arbitrary classification to say that a merchant may be taxed at a higher rate because he owns two or more stores, without regard to the amount of his business, size of his stocks, profits earned, or some essential distinction. Present conditions in the field of merchandising are, it may be noted, in many respects different from those existing at the time the Indiana case was tried.

In the bill filed in this case, it is alleged that regardless of the conditions existing in Indiana at the time of the trial of that case, the differences on which the classification was upheld do not exist in Florida, and did not exist at the time of the filing of the amended bill.

As to quantity buying, it is stated (subsection (a), R. 39) that in Florida the amount or quantity of merchandise which can be bought by a merchant is not dependent upon the number of stores he operates, but upon the size of the business conducted, and that many merchants owning one store can and do buy their merchandise in the same or larger quantities than chain stores or merchants owning more than one store.

The Federal Census of Distribution for 1930 lists in thirteen of the larger cities of Florida,—including Daytona

Beach, Gainesville, Jacksonville, Key West, Lakeland, Miami, Orlando, Pensacola, St. Augustine, St. Petersburg, Tallahassee, Tampa, and West Palm Beach—Single store units 8818; 2 store multiples 523; three store multiples 129; local chains of four and over 235. "Chain store" merchandising has become somewhat confused with large scale merchandising, and a fact apparently lost sight of is that there are great numbers of multiple stores not merchandising on a large scale and many unit merchants who do merchandise on a large scale. It is obvious that a merchant owning two, three or four small stores does not have any advantage with respect to quantity purchasing over many merchants who own one store doing a business equal to or greater than the chains, or sufficient to carry the quantity discount. Paragraph XII of the bill (R. 36) shows that Cohen's department store in Jacksonville has more shoe merchandise than all seven shoe stores of Paxson's Inc., and other shoe merchants, both chain and unit, buy on the same terms as Paxson's. The petition of Independent Furniture Company (R. 81 and 82) shows that it owns three retail stores, and does much less business than a number of unit furniture dealers in Florida, and five furniture stores are named having each but a single store, one of which does three times as much business and the others each five times as much business as all three stores of the Independent Furniture Company; and it is alleged that single store merchants buy on equally as favorable terms as the three-store chain of the Independent Furniture Co.

Of course, mere quantity purchasing is in itself no advantage, unless the merchant is thereby enabled to buy at a lower price. In the drug and grocery business, as is alleged in the bill, the quantities necessary to obtain the best discounts on many items are so moderate that small or moderate-sized retailers can and do obtain them.

We refer the court to the allegations of the bill (R. 22 to 25) with reference to advantages of quantity purchas-

ing enjoyed by unit stores through affiliation with cooperative concerns; yet these stores are taxed only $5.00 each while competing stores of appellants are required to pay many times as much per store for the privilege of operating their stores.

In the Indiana case the court refers to cooperative buying associations and remarks that these voluntary groups cannot be as successfully integrated as chain stores under a single ownership. Without regard to the question of integration, the point here made is that if, as alleged, hundreds and thousands, even, of single store merchants are purchasing their merchandise on terms as favorable as chain stores, they are at no disadvantage in this respect. This being admitted by the motion to dismiss, does this not dispose of and eliminate quantity purchasing as a distinguishing factor between chain stores and unit stores so far as the action of the Florida court in dismissing the bill is concerned?

It may be noted that in times of falling prices large scale purchasing is a disadvantage, not an advantage; and that good merchandising might at some times require quantity purchases while at other times buying should be in the smallest possible quantities.

(b) "Mass distribution" comparable to the mass method in production is referred to, but unfortunately this very desirable end has not been attained, as is shown by subsection (b) of section XIV of the bill. Articles may be made in mass but they cannot be so distributed. The distribution process, especially through a number of stores, each with its separate set of sales people and overhead expenses, is the painful one of reversing the process of mass production, and distributing by single sales of single items to single individuals the articles which are produced by machinery in mass.

(c) With reference to "buying for cash and obtaining

the advantages of a cash discount", it is shown that this is not a characteristic of chain stores alone, or generally, but that many individual merchants owning one store buy for cash and get the cash discounts; and there are many chain store merchants, particularly chain furniture stores, ready-to-wear stores, automobiles accessory stores, etc., that do not buy for cash and do not get any cash discounts (R. 41, subsection C).

(d) As to "skill in buying so as not to overbuy and at the same time keep the store stocked with merchandise suitable in style, size, quality and quantity for the neighborhood customers who patronize them": It is alleged subsection (d), page 42, that in Florida there are many unit merchants who are shrewd and skillful buyers, and multiple store merchants who are not (contrast a recent advertisement of Macy's, saying that they employed 15 special furniture buyers, with what can be done by the three-store chain of the Independent Furniture Co., R. 79); and that skillfulness in buying is a personal attribute, regardless of whether the merchants own one or more stores. It is further alleged that the single store merchant has at least the same, or even a better opportunity, to keep his store stocked with merchandise suitable for a particular neighborhood than the chain store manager (Subsection d, R. 42).

(e) Warehousing of goods and distributing from a single warehouse to various stores.

It is alleged that in Florida this is not an advantage, but is in the nature of a convenience and expense. The Liggett Company and other appellants have no warehouse in Florida. Paxsons and many other chain companies do not use warehouses at all. Warehousing is shown to be a matter of expense, with its rent, taxes, insurance, and other charges.

A warehouse is a place where reserve stocks are carried. The advisability of having warehouses is debatable, and

merchants of all kinds try to limit the amount of their stocks as much as possible. It is obvious that if warehouses are used, the merchandise must be freighted and trucked into them, then if shipped to a number of different stores, must be repackaged and sent out, with the additional freight and cartage charges. The matter of having a warehouse may come to the question of whether it is more economical to carry reserve stocks in the individual store in basement or other like space, paying the rent therefor, or have the reserve stock somewhere else with the necessity for delivering the merchandise when needed. Many department stores and other large single store units have warehouses. The fact that a retail merchant has or does not have a warehouse does not change his status as a retail merchant. At all events it is alleged in the bill that there is no such advantage in Florida; that many individual merchants have warehouses and many chain store merchants do not have them; and these facts are admitted by the motion to dismiss.

(f) As to "Abundant supply of capital whereby advantage may be taken of opportunity for establishment of new units."

That such an advantage is not a characteristic of chain stores is averred in subsection (f) of Section XIV. It is stated that many single store merchants have abundant capital for supplying their needs or enlarging their business, and many multiple store owners do not have sufficient capital even to keep their businesses going, much less to open additional stores. During past periods of prosperity, and especially during the boom and expansion period, plenty of capital was available for all purposes, both for unit stores and multiple stores. The situation is entirely different now. In this respect there was never any difference between chain stores and unit stores, and there is none now. Formerly either could get plenty of capital, now neither can.

(g) As to "Pricing and sales policy different from that of individual stores, involving slightly lower prices." It is averred that many multiple store merchants do not have any pricing or sales policy different from that of individual stores. In the drug business especially, great numbers of merchants having single stores advertise themselves as "cut-rate" druggists. Almost all merchants at times use the price appeal to attempt to secure business and try to sell as cheaply as they can; some merchants sell for cash, some on credit, some deliver and some do not; this is true of unit store owners and multiple store owners and these factors are not dependent on whether a man has two or more stores. Many chain concerns operating furniture, clothing, apparel and jewelry stores sell on credit; in fact a number of them constantly do business on the installment basis. Some grocery, drug and other chains give credit, others do not. Numbers of unit store merchants do a cash, no delivery business; others sell and deliver on credit. These facts are set up in the bill.

(h) As to "A greater turn over and constant analysis of the turn over to ascertain relative profits on varying items." It is alleged with respect to this that turn-over is a matter of volume of business done, and is related to the class of merchandise sold, not to the question of whether the ownership is of one or more stores. For instance in the jewelry, furniture, hardware and other businesses, the turnover is slow, while in such businesses as restaurants and confectionery, turn-over is rapid; that many unit merchants have as rapid turn-over as multiple store owners; that some individual merchants replenish their stocks frequently, and get a larger turn-over than chain store merchants; that analysis of turn-over is a matter of individual energy, temperament and interest in that particular phase of merchandising, and is not dependent or related to whether a man owns one or more than one store.

(i) As to "unified and therefore cheaper and better advertising for the entire chain in a given locality." Many chain store merchants do not advertise at all, while others do, and many unit merchants advertise intensively. It is obvious that advertising where a multiple store owner has only one store in a city or town is not of any advantage, and in large cities where many stores may be owned the prices and articles sold may vary according to location of stores, rents paid, degree of competition and other factors. The advertising applicable to a store in one section would not do for a store in a different kind of section. For further illustration in some cities, department store and unit toilet goods specialty shops use a great deal more lineage on toilet goods, cosmetics and related items, than chain drug companies. So far as advertising is concerned, wide distribution of stores is not an advantage, but a disadvantage. There is another disadvantage suffered by chain stores in advertising, if they attempt to advertise for several stores, as compared to advertising for a single store, namely that advertising for a unit store on a certain day will bring in large numbers of people into the one store, where a few salespeople can handle a large number of sales; whereas, to get the people into different stores means selling through various sets of salespeople, rent expenses, etc. As a matter of fact, any merchant usually spends a certain proportion of his sales, 1 to 3%, for advertising, and this is true as to unit stores or multiple stores. Competitive advertising of specials and other sales is widely done by single store merchants affiliated with concerns such as Better Food Stores and McKesson & Robbins, etc. See amended bill subsection (i) (R. 44 and 45 and exhibits).

(j) "As to standard forms of display for the promotion of sales." Nearly all stores are trying to get away from standard forms, and to use such display as the store owner or manager thinks will attract customers in his locality.

Many individual store owners use the same display methods as multiple owners, and standard forms are available to them if they desire to use them. Groups of unit store owners use such displays, while numbers of multiple store owners do not use standard forms. See subsection (j) (R. 45).

(k) As to "Superior management and method".

This is a characteristic of the individual merchant or concern, not of the ownership of one or several stores. Some chain stores are well managed, some poorly managed. Many unit stores have excellent management and methods, while others have not. Some outstanding chain merchants have been successful, and have established large businesses; some outstanding unit store merchants have had the best of management and built up large businesses. Some small chains are well managed, some small unit stores are well managed; some small chain stores and some unit stores are poorly managed; the same variation is true of large chain and large unit stores. Each store in a chain is in competition with many unit or other chain store merchants in a given neighborhood; some stores have good managers, some poor, and the question of personnel for store operation is one that is constantly confronting chains as well as individuals. Every merchant must face the same problems, and there is nothing inherent in the ownership of several stores that will solve these problems. Efficiency and inefficiency run through every cross section of life and business, and no method has yet been found to change this. Subsection (k) (R. 46), denies any advantage to the chain stores through superior management or method.

(l) As to "Concentration of Management in the special line of goods handled by the chains." This seems to assume a situation (namely, that chain stores are necessarily specialty shops) which is denied in the amended bill of complaint. Chain stores are not specialty shops, but handle various and varied lines of goods; there are department

store chains, handling thousands and thousands of items; general merchandise chains, selling diversified lines; men's clothing chains, selling clothes, haberdashery, shoes and other articles. The Penney Company, Montgomery Ward & Co., Sears Roebuck, W. T. Grant Co., J. J. Newberry Co., operate various departments and sell hundreds of items. The Liggett stores carry 11,000 or more different items, and compete with specialty shops, such as cigar stores, candy and confectionery stores, perfume shops, lunchrooms, stationery and book stores, some owned by merchants owning only one store, some owned by merchants with two or more stores. Certainly the individual merchant can and does concentrate on his particular line to the same extent as the multiple owner. These facts are set up in subdivision (1) (R. 47).

In connection with department stores, the court refers in the Indiana case to the fact that these are groups of different stores under one management. Does not this viewpoint overlook the fact that in the various departments, such as drug, grocery, furniture, books, clothing, shoes, etc., the large department stores will sell in each departments as much merchandise as all or great numbers of the units of the chain stores? For instance, R. H. Macy & Co., are said to do $5,000,000 a year in medicines, cosmetics and toilet goods. This is more business than is done by 90 of the Liggett stores in all their departments, prescription, medicines, hospital, soda, cigars, candy, stationery, etc. Yet under the Florida law Liggett would pay (disregarding the county line distinction) $2,390.00 for the privilege of carrying on its business, while Macy would pay $5.00. In many large, medium sized and some small cities and towns there are department stores with which the Liggett Company and other multiple merchants compete, which do as much or more business than is done by the chains in numbers of their stores. This is true in Florida, with respect to stores in a number of cities. Yet the multiple store owner

is discriminated against in the occupational tax for selling exactly the same things.

Such discrimination also applies as between multiple owners and other multiple owners. For illustration, the Katz Co. of Kansas City, is stated by Standard Statistics Co., to do more than $7,500,000 in eight drug stores; as much as the Liggett Company does in some 100 stores of its small volume stores; yet Katz would pay $75.00 and Liggett $4,790.00 occupation tax, with Katz having every advantage or difference that is referred to in the Indiana case. This is an illustration of the arbitrary manner in which the chain store tax works.

(m) As to "special accounting methods". Accounting methods differ by size of business, class of merchandise sold, whether on cash, credit or installment, etc. There are no special methods of accounting possessed by chain stores not available to the one-store owner. This is another matter of individual judgment and involves factors not connected with whether one or more stores are owned.

(n) As to "standardization of store management, sales policies and goods sold". Every store must, as is suggested in one of the earlier references in the Indiana opinion (keeping the stores stocked with merchandise suitable for the neighborhood customers who patronize them) be operated to suit the needs of its neighborhood. It is not possible to standardize so as to run a store at a busy transient corner of Jacksonville, Florida, in the same way as a store in the small place of Plant City, Florida; nor is it possible to sell exactly the same type of merchandise, cigars, candy, or even medicines, in Bangor, Maine, as in Miami, Florida, in New York City as in Seattle, Washington or Galveston, Texas. Merchandise suitable in Manchester, N. H., in November does not go in Coral Gables, Florida, during that month or later. Earmuffs would not be salable in Miami;

nor sun-burn remedies in Burlington, Vt., in December. Of course, the American people are educated to use a great number of highly advertised specialties, but even as to these, there are brands popular in one city that do not go in others. Store management and sales policies must be different in different places. In some price appeal is a major factor,—in others elements such as service, special sales, combination sales, etc., personal contact, count the most. Stores in the Bronx may vary from those in downtown New York. Stores in manufacturing cities such as Elizabeth, N. J., Fall River, Mass., or Pittsburgh, Pa., differ from the demands of stores reaching agricultural communities in the South or West or suburban or semi-rural communities elsewhere. Standardization may or may not be desirable, but so far as it is desirable, it is used by individual stores as much as chain stores. It would not be possible if the signs designating a particular owner were removed to tell whether a given store belongs to a merchant who has other stores or not. No advantage in respect to so-called standardization is enjoyed by chain stores not available and availed of by unit stores, as is shown by subsection (n) (R. 48).

(o) As to "differences or advantages" shown by "numbers of chains established or their growth".

During the expansion following the war, large capital became available for business expansion. According to the World Almanac, the population of the United States was in 1900, 75,974,575; in 1920, 105,710,620; in 1930, 122,775,046. The country's wealth was estimated at $88,517,307,000 in 1900, $320,863,862,000 in 1920, and $360,068,000,000 in 1928. Naturally to keep pace with these huge increases in population and in purchasing power, numerous stores of all kinds and character were established. Some merchants with one store enlarged their operations; other merchants with one store added another store. The unit stores kept growing at substantially the same rate as multiple stores.

Every time a merchant added a store, this would take one store out of the single unit class and put two into the multiple unit class. New people went into the mercantile business, and all types of business operation expanded. Great numbers of new single unit stores came into existence and merchants took on the ambition to trade with people in distant communities. All kinds of expansion took place in the mercantile as well as every other field. See subsection (o) (R. 49-50).

Since 1929, the reverse process has set in. Chain stores have fallen away with great rapidity, and large numbers have failed, gone out of business or reorganized with less units. Standard Statistics Company last summer listed over seventy-five chain store failures, including many large ones, such as National Family Stores, Metropolitan Five and Ten, F. & W. Grand-Silver Co., Schulte-United Company, Allison Drug Co., Neve Drug Co. Since then United Cigar Stores Company, United Retail Chemists Company, Owl Drug Company, Media Drug Company, Truly Warner, Inc., Newark Shoe Stores, and many others have gone into receivership or bankruptcy; and the rate of failure is large and continuing. Lack of capital, lack of many of the so-called advantages listed in the Indiana case, fall in real estate values, fall in commodity prices, and many other factors have been responsible for the fading away of these multiple unit outfits.

We respectfully submit that if this court's opinion in the Indiana case was not based on the right of the legislature to tax on an ascending scale because of mere number of stores owned (and the court, as we understood, definitely indicated that this was an error into which the lower Federal Court fell in its decision in the *Jackson* case), but was based on differences and advantages alleged to exist, and if these alleged differences do not now actually exist in Florida (as was admitted by the motion to dismiss), the Florida courts should have allowed appellants to go to

proof on the facts set up in Section XIV of the bill of complaint.

Appellant Liggett Company's stores are in competition with stores of both single unit and multiple unit stores in Florida; yet the appellants are taxed out of all proportion to its unit store competitors for the privilege of selling merchandise and serving and trading with its customers. If there are actually not essential distinctions between appellants and their unit store or other competitors, and if their competitors have all the advantages appellants are supposed to have, then surely there is no basis for the discrimination merely because one concern operates through several outlets, the other through one.

In the motion to dismiss the bill, the appellees admitted all the averments of the bill of complaint; yet the Florida court denied the appellants the right to go to trial on the facts set forth in the bill. Does not this deprive appellants of their day in court, and are they not entitled to be heard on their bill?

The matter resolved itself into a situation where, it would seem, the Supreme Court of Florida substituted its assumed judicial notice for the facts set up in complainant's bill.

This court will consider the actual state of facts presented by the factual situation brought to its attention in a particular case (*Weaver* v. *Palmer Bros.*, 270 U. S. 402; *German Alliance Insurance Co.* v. *Home Water Co.*, 226 U. S. 220; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Quong Wing* v. *Kirkendall*, 223 U. S. 59).

In the light of the factual situation presented by the amended bill, we respectfully submit, the action of the Florida courts in dismissing the bill should be reversed.

POINT III.

Some economic and legal consequences of chain store tax legislation and decisions.

1. GENERAL.

In connection with the foregoing, we very respectfully ask permission of the court to discuss certain economic and legal phases of the chain store tax legislation and the *Jackson* decision, and the consequences that have grown therefrom.

We believe that it has always been the policy of the American system of government and of the Constitution of the United States to allow merchants to trade freely among the states, counties and cities, and with all the people, without artificial restrictions either through police regulations or arbitrary taxation. Indeed, in the original formation of our constitution, its framers were careful to preserve, free and unrestricted, the rights of the citizens of any state to trade with those of all other states. The common callings are open to every one; no monopolies, preferences or advantages may be given by legal restrictions in favor of one class of persons as against another. Furthermore, any person, from whatsoever walk of life springing, may enter into these common callings and may use whatever talents he has, and whatever opportunities he can avail himself of, to develop and spread, grow and expand.

A small merchant starting in in some small community, or a moderate sized place, or in some section of a large city, may build his business there to its limits, and spread to another section. Branch stores are nothing new in the history of this or any other country; and the natural and normal thing for a merchant to do who has one store in a locality and who thinks that he can successfully run another or other stores is to try to reach and trade with other people

in other locations by starting a branch in another place. Some merchants have been able thus to project their personalities and their business acumen over large numbers of stores. It has taken a great number of years and a tremendous amount of hard work to do this. Illustrations are J. C. Penney, with his starting store at Kemmerer, Wyoming, F. W. Woolworth, with his starting store at Watertown, N. Y., and Hartford with his starting store on Vesey Street, in New York. Other merchants have concentrated up their trade at a single location, by encouraging people to come into their stores through price, service and special merchandise appeals. Illustrations are R. H. Macy & Co., Marshall Field & Company, John Wanamaker; and in every city and moderate sized town there is an outstanding merchant who does a large volume of business in a single location. There are also numerous, less outstanding and indeed less successful merchants, who have endeavored to extend their trade in other parts of a city, into other cities and towns and trading locations by putting stores into such localities. Mercantile concerns with several or numbers of units have been given the name "chain stores"; but this is not a system of merchandise different from any other stores; nor is it a new thing springing up over night. Indeed, in the successful (and some of the unsuccessful) instances it has been of long and slow growth, though accelerated by the boom and expansion period which began about the time the United States entered the world war and terminated with the financial and commercial debacle of 1929 to the present. For instance, Hartford (A. & P. Co.), started in 1859; Woolworth shortly after the Civil War; Penney 30 years ago; and it is claimed that the first store of the present Liggett Company was started by Riker, or some predecessor druggist, back as far as 1826.

During the expansion period numbers of merchants, many of whom have fallen by the wayside, endeavored to

spread out into other communities and to trade with the people of these communities through stores there located. Stock promoters sold stock in projected chain concerns, pointing to the success of Woolworth and a few others as an inducement to investors to subscribe. Great numbers of stores were also during this period opened and established by merchants having but one store, and by merchants who branched out with two, three and a small number of stores.

Among the merchants who have multiple stores, the businesses are varied and diverse, and variously and diversely operated. Some are in the drug business, some in the grocery, some in the novelty, some in the department store line, selling almost everything,—some in general merchandise,—no special articles but anything their trade requires,—some deal in furniture, some in jewelry, and in every conceivable line; and the merchandise they sell is mixed and varied, the druggists carrying books, stationery, even toys, the grocers selling meats, cigarettes, etc., the variety chains selling almost everything. Some of these merchants sell on credit, some for cash, some on the installment plan; some are well managed, some poorly managed; some have warehouses, others do not; some advertise extensively, others not at all; some believe in buying in large quantities, some in hand-to-mouth buying; some pay their bills promptly and take discounts, some do not; some deal in quality merchandise, others in low or moderate priced articles; some cater to a quality trade, and sell at higher prices than others in the same line, because of rent and convenience of locations, service and other factors; some endeavor to give a high type of service, others have fewer salespeople and do not feature service; indeed some are self-service outfits; some are well capitalized; others are operating on meager capital; some standardize, others diversify; some are specialty shops, others sell hundreds, even thousands of different items; some use cheap fixtures and pay little attention to store appearance; some have

expensive fixtures and beautiful stores. These variations are exactly paralleled by the variations in unit stores. In a word, it may be said that the field of retail trade contains to some degree as many variations as there are merchants.

The only actual common denominator found among multiple store merchants is that they all own more than one store.

Some unit merchants do more volume of business in the same line than many chain stores in all their stores. Some carry more stocks than are found in all the stores of a so-called chain. Some do as much business in a single line as all or many stores of a competing multiple store merchant.

Every unit of a multiple store competes with many single stores, department stores, other multiple store units; and in the case of the department store chains, variety chains, drug stores, and practically all other stores, there is competition with departments of many other stores, single or multiple, specialty shops, etc. In the case of the *Liggett Company*, for illustration, in addition to competition with other drug stores, there is competition with department stores, perfume stores, general merchandise stores, with grocery stores in soaps, toilet preparations, cleaning fluids, insecticides, cigars and cigarettes, some proprietary medicines, and other articles; with confectionery stores, lunch rooms, restaurants, in candy and soda and lunches, with cigar stores, with book and stationery stores, and with many departments of various stores selling some of the same merchandise as the Liggett Company sells.

Each unit of a multiple store merchant must of necessity be operated separately, in respect to the needs, desires and habits of the individual city or community, or even parts of a community. Price competition is different in different localities, and even in the different sections of the same city. Small town stores require different handling from large city stores. The managerial ability and personality of the

local store manager plays a vital part in the success or failure of the store. In other words, each store must be conducted with regard to the local situation and local competitive conditions.

The manager and personnel of each store depend for their success on what they are able to do with their particular store, and whether they can satisfy the demands and wishes of their customers.

There is nothing magical or mysterious in the words "chain stores"; nor anything novel or different in what they try to do; they are simply groups of separate stores under one ownership. Their success or failure lies in how successfully they are managed and how well they are able to meet the needs of the communities in which they are located.

The building of good roads, the natural growth of population, have built up communities which form, of course, trading centers; and the merchants have undertaken to reach these communities with their stores.

Through cooperative buying associations any retailer, single store or otherwise, can get the benefit of quantity discounts. During recent years numbers of such associations have been formed, and some have extended their activities into sales promotion, advertising, fixturing and other fields.

Following the Indiana decision there have been a number of legislative enactments taxing chain stores. Among them is an ordinance in Hamtramck, Michigan, and a like ordinance in Maplewood, Missouri, placing a tax of $1,000.00 per store on each store over one; and the City of St. Louis, Missouri, has adopted an ordinance putting a graduated tax on multiple stores which runs up to $250 per store on each store over 25.

In the Indiana case, as we understand that decision, the court did not place the stamp of approval on the graduated taxation of stores because of the *mere ownership* of a number of stores; but based its decision on a differentiation in

the type of business, enumerating certain things as among the differentiating characteristics.

Yet in spite of the implications of this decision, the result has been to tax multiple store owners *solely on the basis of the number of stores possessed and without regard to whether they possessed any or all of the supposed differentiations.* Thus stores are taxed which do not purchase in quantity, which do not have warehouses, which do not advertise, which are poorly managed, which have inadequate capital, which do not standardize in any way, which do not specialize, which do not have expert buying, which have none of the characteristics referred to in the Indiana case, while single store owners having many or all these characteristics escape taxation.

2. LACK OF RELATIONSHIP BETWEEN TAX LIABILITY AND TEST OF CLASSIFICATION HAS LED TO ARBITRARY DISCRIMINATION.

The vice of this situation, it seems to us, is inherent in the type of the legislation, and ineradicable from it. Under these statutes the tax collector does not have to ascertain whether the multiple stores possess any characteristics differentiating them from the unit stores. It makes no difference whether merchandise is purchased in quantity, whether managerial skill is possessed, whether there is skill in buying, whether there is ample capital, etc.; the tax collector is not even interested in these things; *all that he has to do—all that the statute requires of him—is to count the number of stores and levy the tax.*

Thus Paxson, with seven little shoe stores in Florida pays $95.00 of tax, while Cohen's Department Store carrying more stock and doing more business in shoes than all the Paxson stores, pays $5.00 of tax.

It is difficult to understand why this is not purely arbitrary classification.

The tax is levied without any logical and substantial relationship between the taxing act and the method of classification. The only test of tax liability laid down by the statute is the number of stores owned. The result which has come about violates, we believe, a principle long held essential by this court in tax discrimination as well as police power cases.

If logical relationship were present, it would seem that there should be no difficulty in applying the tax to those who come within the class subject to the tax; but because of the lack of relationship between the ownership of more than one store and the factual characteristics necessary to sustain the classification, no tax-collecting authority is required to administer the tax on the actual basis held to support the classification. This court, in effect, as we understand, declined to sustain the classification because of the mere ownership of more than one store, but the tax-collecting authorities, on account of the nature and wording of the statutes, must and do apply the tax solely on the basis of number of stores owned.

To illustrate this point of lack of relationship, we refer again (at the risk of some repetition) to some of the so-called differentiating characteristics.

Quantity purchasing. Of itself, the phrase "quantity purchasing" means nothing, and it is apparently assumed that by such quantity purchases merchandise is handled at a lower cost. It seems also to be assumed that buying in quantity is a good thing, though in times of falling prices it will obviously lead to losses. One merchant may prefer to buy in small quantities and let the supplier carry the investment, while another merchant may consider it advisable to buy the larger quantity and get a discount, carrying the surplus stock until he sells it. Quantity purchasing is merely one item of cost of merchandising, and there are innumerable other elements going to make up the cost at which merchandise must be sold, such as rent, wages,

light, freight and cartage, etc. The expense of quantity purchasing and warehousing, if done, and the other expenses of overhead—of a central staff if there is one—may easily enable the merchant not buying in quantity to sell at the same prices as the merchant who does purchase in quantity. Many of the items sold in drug and other stores are subject to the best discounts when bought in moderate quantities. Many department stores and other large-scale unit merchants and many small merchants affiliated with buying associations get all the benefits of quantity purchasing. Regardless of these considerations, and regardless of whether the chain store merchant, be he a two-store or twenty-store owner, buys in quantity, the tax collector does not have to make any inquiry in this regard, since all the law requires is that the stores be counted, and taxed according to number; and the single store owner buying in quantity or getting the best quantity prices, pays but a fraction of the tax—because under the statute quantity purchasing is not a test of tax liability.

The same applies to buying for cash, and getting cash discounts. Regardless of whether the merchant does or does not buy for cash,—and there are plenty of single store merchants who do and plenty of single store merchants who do not—the multiple store owner pays the discriminating tax—the unit store owner does not,—because this element is not a test of tax liability under the statute.

This likewise applies to "skill in buying". The greatest skill in buying may be possessed by a unit merchant, yet he is not taxed, while the multiple store owner pays the tax.

So with warehousing of goods. Whether this is done or not the multiple store owners pay; the unit merchants (such as large department stores with huge warehouses) do not.

Abundant supply of capital may exist in the unit store, and not in the chain store; pricing and sales policy

may be identically the same in the unit as in the chain store; turnover and analysis may be the same, or the greater turnover may be with the unit stores; the chain store may do no advertising—the unit store a large amount; the chain store may not have standard forms of display; the management of the chain store may be not superior, but distinctly inferior; the badly managed, inefficient chain store pays, while the efficient unit merchant escapes; there may be no "special line of goods handled by the chain" in which it can concentrate; it may sell every diversified line sold by a department store, may in fact be a department store chain; yet the chain store would pay, the unit would not; there may be no "special accounting methods", and standardization of store management, sales policies and goods sold may be entirely absent; this does not exempt the chain store from the tax.

Any chain store concern may be lacking in some, any or all of these enumerated elements; it nevertheless pays for its stores many times the tax paid by the unit merchant who has all of them or some of them. If these elements must be interrelated and interdependent so as to bring about the differentiation and sustain the classification, it would seem that the chain store lacking any of the essential elements (such as superior management for instance) would not fall within the classification of stores which, under the apparent intent of the Indiana decision, should pay the discriminatory tax.

The point is, however, that the statute itself does not make the possession of any of these elements or some of them,—or all of them interrelated and interdependent,—a test or criterion of liabiilty for the tax. *The sole standard* is the number of stores. If the merchant has a number of stores, this is all the statute or the tax collector looks to. If the statute made the possession of abundance of capital a test all who had abundant capital would be subject to the tax, and those not possessing it would be exempt. So

with each of the other elements referred to. The legislators and aldermen who pass these laws do not, we believe, look at any element other than the possession of a number of stores. The form of the statutes and ordinances shows this.

In the Indiana case the court said that the court below fell into the error of assuming that the distinction between the chain store business and other stores was solely one of ownership. We respectfully suggest that this is an error made, requisite and inevitable in the framework of the statute; and is one into which every tax collecting authority and every tax-payer is bound to fall, due to the inherent nature of the tax in resting the discrimination solely on number of stores owned.

3. TAXATION AND CLASSIFICATION BY INTANGIBLE PERSONAL ATTRIBUTES.

Among the points of difference listed as supporting the classification are "skill in buying" and "superior management and method". This would seem to lead to the conclusion that if one merchant is efficient and another inefficient, the efficient merchant is, for classification for occupational tax purposes, in a different kind of business from the inefficient trader. Such a principle would, it seems, make it possible to tax every person in every occupation on a different rate, dependent on the taxing body's judgment as to the amount of skill or ability possessed by each individual. How the taxing authorities are to apply such a basis of classification is very hard to imagine. Our constitutional system allows all persons to engage in a vocation on equal terms. The tax levying authorities could hardly say that Jones is efficient and shall pay a large tax and Smith is inefficient and shall pay a small tax; or vice-versa that the inefficient merchant shall pay a large tax and the efficient one a small tax. Such things as managerial ability and skill in buying do not show differences between two

types of occupation but between the men operating them; and on this basis an inefficient chain store would be taxed on a different basis from an efficient one. To get at a true comparison as to whether there are differences in unit store and chain store merchants, it would seem that you would have to eliminate these intangible and unmeasurable personal characteristics and contrast a unit store that has capable and superior managerial ability with a chain store owner who also has buying efficiency and superior managerial ability; and an inefficient chain store owner with an inefficient unit store owner. Contrasting efficiency with inefficiency does not seem to distinguish, for occupational purposes, merchants or any other class of business man.

These personal managerial qualifications change from time to time, and sometimes in the same persons as the years go on; as experience is gathered or as habits may harden into stubborn inflexibility. For instance, the merchant who in the years prior to 1929 rushed out and hired a great number of stores and bought great quantities of merchandise and rented warehouses in which to store it, and did an expanding business based on pre-depression volume or continuously rising prices, may have been a great captain of industry prior to 1929; but with his business loaded up with too many stores or with rents disproportionate to any volume of business that can now be done, with warehouses that he cannot use or does not need, and with losses accumulating month after month as prices fell, what may have appeared to be superior management under conditions applying a few years ago may not have turned out to work so well under different conditions.

4. ALL COMPETITIVE STORES FAVORED OVER CHAIN STORES WITHOUT REGARD TO EXISTENCE OF DISTINCTIONS OR ADVANTAGES.

A good deal has been said about department stores and chain stores. The court in the Indiana case recognizes that

the department stores have such advantages as large capital, buying in quantity, managerial ability, etc., but distinguishes between chain stores and department stores on the ground that the unit stores with separate departments are not comparable to chain stores concentrating on a single line. This involves several elements to which we would like to direct the court's attention. First, it appears to be assumed that the chain stores are all specialty shops, which assumption seems to overlook the fact that great numbers of chain stores do not specialize in a single line since many of them are department stores, general merchandise stores, variety stores, etc., and others carry thousands of different kinds of articles for sale; secondly, the comment that the mass buying of a department store for a particular department is not comparable to the buying of a chain for its stores appears to overlook the fact that numerous department stores in direct competition with chain store units buy and sell more of a particular line of merchandise than many stores in chains dealing in that particular merchandise. In shoes, hats, clothing, shirts, books, furniture, etc., Macy's, Wanamaker, Gimbel, Bloomingdale, Marshall Field, The Fair, J. L. Hudson, Jordan-Marsh, for instance, and numerous other department stores in various cities and towns—and at least one or more in practically every large city—will do as much business as all the stores of a number of the small chains in these various lines; and as much business as many stores of the largest chains,—and the quantities purchased by the single unit department stores are sufficient to get the best quantity discounts and the business large enough to use the best employable buying and selling skill. There would seem to be no reason for taxing these unit stores at a $5.00 rate while 2 to 50 or even a hundred chain stores having no greater business, no larger stocks, and no advantages over their competitors, would pay $15.00 for two stores, $1475.00 for 50 stores and $4955.00 for 100 stores under laws like the Florida act (disregarding

the additional retroactive county line discrimination of that act).

It is well recognized, also, we believe, that large stores which can concentrate a great volume of business in one place, handling the customers through one set of salespeople who are kept constantly active, having one set of overhead for light, heat, etc., can make much more money and handle their merchandise more cheaply than if the same volume of business were done in a number of different stores, with numerous sets of salespeople, rent and overhead expenses.

It appears that chain store merchants are penalized whether their business is on a large scale or a small scale. Thus, a chain store owner doing a business of a million dollars in numerous stores pays many times the amount of tax paid by a department store doing a like volume in exactly the same line. A chain of 3 stores doing $75,000 of business pays five times as much in Florida as a single unit store doing $100,000 in the same line.

Also the statute makes no distinction as to class of merchandise sold or the department in which it may be sold. The tax is on the occupation of selling merchandise,—any kind of merchandise, without specification. Department stores are general merchandise stores. For keeping the biggest store, the department store pays $5.00; for small stores the chain pays per store many times as much tax. Also as is apparent, if each of the departments of the department stores were under a different roof, the tax would apply. Housed under one roof the tax does not apply. But for every roof of a chain store a cumulative tax is paid.

These are vices inherent in the type of law, and operating to give one merchant a competitive advantage over another in that the one escapes taxation, the other is heavily taxed.

By belonging to cooperative buying and merchandising associations, the unit stores obtain the benefits of

large scale merchandising; and the question would seem to be, not whether the stores belonging to cooperative associations are integrated as to ownership or in other respects in the same manner as chain stores, but whether they actually possess the various advantages that the other merchants are said to have. A number of chain store concerns are affiliated with cooperative associations, yet they pay the tax while single unit competitors do not. If single units affiliated with cooperative concerns operate on an equal basis with chain stores, it would not seem warranted that they should be favored by legislation allowing them to carry on exactly the same business—that of keeping store—on a less basis of taxation.

Some of the chain store owners (as do some of the department stores) merchandise on a large scale. The chain store companies doing very large-scale merchandising are few in number, but it may be that because these few successful and large concerns with many stores are prominent, merchandising through multiple store ownership—chain store merchandising—is thought of as large scale merchandising. That this is not generally true is shown by the number of two-store chains, three-store chains and local chains of 4 or more found in thirteen places in Florida previously referred to.

The Bureau of the Census states that in the United States there are 24,535 two-store merchants operating 49,070 stores, and 5,171 three-store merchants operating 15,513 stores; and in the State of Florida there are 400 two-store merchants with 800 stores; together with 77 three-store merchants with 231 stores. In the United States there are 3,177 chains with 4 to 6 units, having 13,638 stores, and 1,998 chains with 6 to 10 units. The chain store tax burdens reach these merchants regardless of size of business, stock carried, advantages or disadvantages with respect to competition, or any other consideration than number of stores owned. Obviously, many of these concerns cannot have much in the way of central staffs, warehouses, etc., unless as in the case of the

Katz Company store previously referred to, some of them do large volumes of business in their few stores, and this would be dependent entirely on the scale of the business conducted and not on the number of stores owned.

Now, large scale merchandising, if it carries with it advantages, also carries with it offsetting disadvantages. If through buying in large quantities and operating warehouses for storing the merchandise, quantity discounts can be obtained, the expenses of the warehousing and reshipping must be borne; if the chain is large enough for central executive and branch offices, "special accounting" forces and field men for contact with the stores, overhead expenses are created which the small local unit store does not have to meet. In times like the present, the small merchant has a flexibility that the large merchant, whether one of the big chains or a department store, does not enjoy. In the ordinary operation of his store in normal or abnormal times, the unit man, if alert and diligent, as thousands are, can adjust his expenses and handle his business so that his total cost of operation will enable him to sell on the same basis as the large scale operator,—if he is willing to do so. Willingness to do so is a factor for the reason that if a merchant is satisfied, with a small return on his capital, he may sell at less than one who demands a larger share. Willingness of large concerns to take a small return on invested capital may make a sharp difference in the price for which their articles are sold, as contrasted with a small merchant who insists on a higher return; and the reverse is of course true where the large concern wants large dividends and the small one is satisfied with moderate returns on his capital. If a merchant watches his credit costs and losses and delivery costs carefully, he can sell as cheaply as any one—if willing to do so. If he does not sell on credit and does not make deliveries, he may have to content himself with a smaller volume of business, but of course some losses and expenses are eliminated. This is true of chains, unit stores, department stores, and all merchants,

who vary credit and delivery practice as their trade demands or their judgment dictates. In the drug business there are instances of one-store merchants on side streets who sell for cash and by low-price appeal do $400,000 to $500,000 of business, taking 2% return, making a substantial amount of money, and meeting prices of all competitors.

Innumerable alert, intelligent unit operators are at no disadvantage with their competition of whatsoever sort. With no substantial overhead and no large expenses, these merchants do not need that which they are not entitled to, but which they have in some states and cities, the favoring factor of a discriminating tax against some of their competitors.

This discriminating tax is becoming more and more severe, as to the state tax, there are added county taxes and municipal taxes. Thus a chain store may be subjected to three sets of taxes;—and certainly there cannot be three different sets of advantages.

There is of course a non-essential distinction between the merchant operating through a number and the merchant doing business in one store, in that the office of the multiple owner is in a different place from one or more of the stores; and also in that the second and subsequent stores must be operated through agents. Such distinctions have been held by this court not sufficient to justify separate classifications for occupational purposes.

The further effect of the chain store taxing statutes, is to encourage large stores and the concentration of business in large centers; and to discourage the spread of stores to small communities and little trading centers.

5. MERCHANTS WHO OPEN A SECOND OR ADDITIONAL STORES DO NOT THEREBY PLACE THEMSELVES IN A NEW TRADE OR CALLING.

The *Metropolis Theatre* case, 228 U. S. 61, is referred to as a precedent for the chain store tax statute. The classifi-

cation on the basis of amount charged per ticket seems clearly distinguishable. This is a tangible, measurable thing, furnishing a direct method of differentiation. There is no such element expressed in the chain store statutes and none at all aside from the number of stores operated. The other point in the *Metropolis* case is that the second type of theatre is said to have placed itself in a different class by deliberately choosing to operate the higher priced theatre, and that this affords basis for the legislative action. The one store merchant who becomes a two-store merchant makes no choice of deliberately embarking in a different type of business, nor any choice of charging higher or lower prices, or changing the nature of his business. All he does is to try to extend the identical business he has always been in, pursuing the same activities exactly. The theatre man who chose to operate a 50c. maximum price might be going into a different priced business if he opened a $1.00 maximum house; he would not be going into a different business if he opened a second 50c. theatre. If one 50c. theatre man had a house with a seating capacity of 3,000, and did a business of $450,000.00 per annum, and another 50c. theatre man had a house with a seating capacity of 300 and opened seven more theatres each with a seating capacity of 300, a total capacity of 2400 and did a total volume of $360,000.00 and a taxing statute taxed all theatres at $5.00, the one theatre man would pay $5.00 and the eight theatres would pay $40.00. But if the one theatre man had to pay $5.00, and the 8-theatre man had to pay $5.00 for the first theatre and $15.00 each for the next three and $20.00 each for the next three and $25.00 for the eighth, $135.00 or 27 times as much as the one-theatre man, on the assumption that the possession of eight theatres gave him great advantages over a one-theatre man, he would certainly seem to be discriminated against, in being charged $17.00 per theatre while his competitors—large, small and medium

sized—in each neighborhood would be paying only $5.00 each in tax—$135.00 for the privilege to one man of owning eight theatres (plus possible added taxes for the county and municipality), $40.00 for the privilege to eight people to own eight theatres.

And it would not console the eight-theatre man a great deal—as he looked about and saw several one-theatre concerns that were larger and a number that were equal in size to several of his theatres—to know that he had to pay the extra amount of taxes because he was supposed to have superior managerial ability from the fact that he had eight little theatres instead of one or a few big ones.

The druggist or clothier, shoe man, or general merchandiser does not go into a different business or change his calling when he opens his second or tenth or twentieth store; nor into a still different business every time the number of his stores reaches the higher tax brackets of the chain store statutes. He is in still the same business, with all its old attributes and all its old problems. He is simply trying for more trade, as he constantly does in his one or each of his several stores.

Conclusion.

Because the actual result of the chain store statutes has been to tax solely by number of stores, and because the taxing requirements of such statutes is not connected up with the basis of classification deemed to support the discrimination, the Indiana decision seems to become a precedent for levying occupational taxes on an arbitrary basis—for the tax may be collected whether the supposed grounds of classification exist or not. If amount of capital employed is a distinguishing characteristic, all who have like amounts should be taxed equally; but stores or automobiles, or boats, or houses, or acres of land, can if the type of the chain store laws be followed, be classified and taxed on

an ascending scale, without regard to the capital employed in the business, or the size, capacity or type of the thing taxed, or any other tangible feature; and the Indiana decision seems also to stand as a precedent for classification based on skill, efficiency, superiority and other personal attributes.

Because of the fact that the tax collector need go no further than count the number of stores and apply the tax, the result is to create all kinds of confusion and discriminations in taxation of stores, single unit or multiple, regardless of stock carried, space occupied, business done, income earned, or any other basis.

This court has not hesitated to overrule previous decisions for considerations appealing to it as controlling; if the considerations suggested above lead the court to the conclusion that such statutes as the Indiana and North Carolina chain store tax laws or the Florida law, their offspring —using as a sole measure of classification the number of stores owned—should not be sustained, the Florida statute might be declared unconstitutional on its face, and the previous cases overruled.

Regardless, however, of these general considerations, we respectfully submit, that the Florida statute, is arbitrary and void on its face because of the county line discrimination; and in any event, we further respectfully submit, the factual situation presented by the amended bill of complaint is such as to require reversal of the decision of the Supreme Court of Florida, and the sending of the case back to the Florida court for trial, thus allowing appellants their day in court.

Respectfully submitted,

ROY M. STERNE,
Counsel for Appellant,
Louis K. Liggett Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 301.

LOUIS K. LIGGETT COMPANY, a corporation, et al.,
Appellants,

against

ERNEST AMOS as Comptroller of the State of Florida, et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF FLORIDA TO THE SUPREME COURT OF THE UNITED STATES.

BRIEF FOR APPELLANT J. C. PENNEY COMPANY.

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INDEX.

PAGE

Nature of case 1
Official report of the Court below 1
Statement of the case 2

Florida Act.

Graduated taxing provisions 2
Summary of argument 5

Argument.

POINT I—Discrimination by county line 5

POINT II—Inasmuch as for the purposes of this appeal it is admitted that in Florida there are no such differences between single store owners and multiple store owners as were found by this Court to exist in Indiana, the sole question before this Court is whether number of stores operated constitutes a basis for a valid classification. Such classification in the absence of other factors being obviously arbitrary, the appellants should be permitted to prove on a trial the truth of the allegations of the amended bill of complaint 7

Appellants should be permitted to prove true facts upon a trial 8

POINT III—The Indiana chain store decision of this Court rests upon an erroneous assumption of facts 9

No difference between chains and individual merchants on warehousing and other functions testified to by Professor Rawls of Indiana 9

Beginnings and growth of chain stores 10

Chain store entity no different from local store 12

PAGES

POINT IV—Many erroneous impressions regarding chain retailing will be corrected by the reports of "Census of Distribution," now being published by United States Department of Commerce for the first time 13

POINT V—It being admitted for the purpose of this appeal that there are no factual differences between a single store merchant and a multiple store merchant, we submit that a classification based upon the number of roofs under which a merchant does business is arbitrary and invalid 14

POINT VI—The effect of validating a classification based upon one method of retail distribution as against all other methods is to hamper and possibly to destroy a method made necessary by present day conditions in order to stabilize industry and help cure overproduction 15

Conclusion 17

Appendix A.

Article of Dr. Charles A. Beard in New Republic, November 30, 1932 19

CASES AND AUTHORITIES CITED.

Tax Commissioner vs. Jackson, 283 U. S., 527 ..... 5, 7

Distribution No. R 36, United States Summary, Preliminary Cause of Distribution Report conducted by United States Department of Commerce 9

People ex rel. Farrington vs. Mensching, 187 N. Y., 8 14

Article of Dr. Charles A. Beard in New Republic, November 30, 1932 15

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LOUIS K. LIGGETT COMPANY, et al.,

Appellants,

against

ERNEST AMOS as Comptroller of the State of Florida, et al.,

Appellees.

BRIEF FOR APPELLANT J. C. PENNEY COMPANY.

This brief is presented on behalf of the appellant J. C. Penney Company.

A. *Nature of the Case.*

The case involves the constitutionality of a tax statute applying to merchants discriminating occupational license fees according to the number of stores owned and imposing a much higher tax if any stores are located in more than one county.

B. *Official Report of the Court Below.*

The majority opinion of the Supreme Court of Florida concurred in by four justices of that Court and the dis-

senting opinion of two of the justices of that Court, are contained in 141 So. Rep., pages 153 to 171.

C. *Concise Statement of the Case.*

The act involved, to wit: Chapter 15,624, Acts of 1931 of the Laws of Florida, is an occupation tax applying to merchants, requiring a license for the privilege of owning or operating a store or stores in the State of Florida, graduating in an ascending scale according to the number of stores owned, and providing an additional type of discrimination not found in any previous statutes, based solely on county lines, so that higher amounts (ranging from 50% to 25%) are required if the stores are located in different counties than if the same number of stores are located in one county.

Section 5 of the act prescribing the tax reads as follows:

> "Section 5. Every person, firm, corporation, association or copartnership opening, establishing, operating or maintaining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act.
>
> The license fees herein prescribed shall be as follows:
>
> '(1) Upon one store, the annual license fee shall be Five Dollars for each such store.
>
> (2) Upon two stores or more, but not exceeding fifteen stores, where the same are located in

any one county, the annual license fee shall be Ten Dollars for each such additional store.

(3) Upon two stores or more, but not to exceed fifteen stores, where the same are located in different counties, the annual license fee shall be Fifteen Dollars for each such additional store.

(4) Upon each store in excess of fifteen, but not to exceed thirty, when all are located in any one county, the annual license fee shall be Fifteen Dollars for each such additional store.

(5) Upon each store in excess of fifteen, but not to exceed thirty, where the same are located in different counties, the annual license fee shall be Twenty Dollars for each such additional store.

(6) Upon each store in excess of thirty, but not to exceed fifty, where all are located in any one county, the annual license fee shall be Twenty Dollars for each such additional store.

(7) Upon each store in excess of thirty, but not to exceed fifty, where the same are located in different counties, the annual license fee shall be Thirty Dollars for each such additional store.

(8) Upon each store in excess of fifty, but not to exceed seventy-five stores, where all are located in any one county, the annual license fee shall be Thirty Dollars for each such additional store.

(9) Upon each store in excess of fifty, but not to exceed seventy-five, where the same are located in different counties, the annual license fee shall be Forty Dollars for each such additional store.

(10) Upon each store in excess of seventy-five, where all are located in any one county, the annual license fee shall be Forty Dollars for each such additional store.

(11) Upon each store in excess of seventy-five, where the same are located in different counties, the annual license fee shall be Fifty Dollars for each such additional store.

In addition to the above amounts, Three Dollars for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store.' "

The complainants, owners of two or more stores located in different counties, sought through their amended bill of complaint (R., pp. 2 to 76), filed in the Circuit Court of Leon County, Florida, to restrain the enforcement of the act, and to have it declared invalid because arbitrary and unconstitutional. The bill sets out facts affirmatively showing that no basis exists for discrimination or for classifying complainants' stores differently from the stores of merchants favored by the act, and particularly and in detail denied the existence of any facts or grounds of difference warranting discrimination or different classification. The appellant, J. C. Penney Company, the owner of two or more department stores located in different counties, intervened in said cause on account of its interest in the subject matter (R., pp. 89 to 97) which intervention was duly allowed by the Circuit Court (R., p. 161) and in said petition for intervention adopted the amendments of the amended bill and sought the same relief as sought by the complainants named in the amended bill.

Appellees filed a motion to dismiss the amended bill (R., p. 77), which motion was granted by the Circuit Court (R., p. 101). The case was appealed to the Su-

preme Court of Florida and there affirmed (R., pp. 148, 159); and it is from the final decree of the Supreme Court of Florida that this appeal is taken. The motion to dismiss admitted the facts set forth in the amended bill; yet the Supreme Court of Florida by its action refused to hear the complainants and the intervenors and thereby deprived them of their day in court.

Summary of Argument.

This brief is supplemental to the two other briefs presented by other appellants upon this appeal. In this brief the appellant has relied chiefly upon the factual situation, namely, upon the discrimination by county line of the tax, and upon the fact that in this appeal it is admitted that the so-called "chain store characteristics" which were found to exist in the Indiana decision (*Tax Commissioner* vs. *Jackson*, 283 U. S., 527) do not exist in Florida and that as a matter of fact it will be proven upon the trial that chain stores do not have different distinguishable taxable characteristics from the individual stores and that classification by numbers of stores in the absence of such factual differences is arbitrary and invalid. This brief has not attempted to go into the law as shown by previous decisions on similar points inasmuch as the law is fully covered in the two other briefs submitted by the appellants. This argument confines itself to the facts.

POINT I.

Discrimination by county line.

The Florida statute (R., pp. 107-108), not only imposes a graduated tax on so-called "chain stores" (as in Indiana), but in addition, it imposes from 50% to

25% additional taxes on all stores of any owner, if that owner operates stores in more than one county in Florida. This statute then not only discriminates between one store operator and operators of more than one store, but in addition goes so far as to discriminate for tax purposes between store owners who operate more than one store depending entirely on the number of counties operated in.

If a chain under this act is confined to one county, the tax commences at $10.00 per store and graduates up to $40.00 per store; if located in two or more counties the tax commences at $15.00 per store and graduates up to $50.00 per store.

If a merchant operates fifteen stores in one county, his tax is $145.00. If he operates fourteen stores in one county and one just across the line in another county, his tax is $215.00. If a merchant operates two hundred stores in one county and desires to start a new store across the county line, the opening of that new store will cost him $2,040.00 in increased tax. If a county in which a number of chain stores are established should be divided, then according to this county line discrimination the tax on each store in the old, as well as the new county, would be increased in a sum from Five to Ten Dollars per store, solely because of the county subdivision (Sub. 11 of the Act, R., p. 108).

Such a classification is so obviously arbitrary and unreasonable as to require no argument.

POINT II.

Inasmuch as for the purposes of this appeal it is admitted that in Florida there are no such differences between single store owners and multiple store owners as were found by this Court to exist in Indiana, the sole question before this Court is whether number of stores operated constitutes a basis for a valid classification. Such classification in the absence of other factors being obviously arbitrary, the appellants should be permitted to prove on a trial the truth of the allegations of the amended bill of complaint.

In this case the respondent admits there are no factual differences between so-called "chains" and other stores, such as were found by this Court to exist in the Indiana Chain Store Tax case (*Tax Commissioner* vs. *Jackson*, 283 U. S., 527). It contends that the statute of Florida is valid on its face, although the statute does not characterize or classify stores, except in so far as the ownership of one store is different from the ownership of more than one store, and by a four to two decision the Supreme Court of Florida holds that no trial is necessary to determine whether there are factual differences to sustain the classification beyond the bare ascertainment of whether there is more than one store in one ownership.

The respondent interprets the decision in the Indiana case to hold that the factual differences pointed out in this Court's opinion in that case were wholly immaterial. So confident is the respondent that this is the correct interpretation of the Indiana decision that it admits the truth of the facts alleged in this bill of complaint which categorically denies the existence in Florida of the fourteen factual differentiations between chains and other stores, about which Professor Rawls from the University of Indiana testified in that case.

The question is now presented by this record for the first time, whether on the admission that there is no difference in Florida between chain and non-chain stores, a classification based on the single test of the ownership of more than one store is valid.

Unless this Court will make it clear that the alleged facts derived from the testimony of the professor were material in the decision in the Indiana case, there never can be a thorough-going presentation of the actual facts in this political legislative fight. While such legislation is intended ostensibly to protect the small independent merchants, we submit that it actually destroys their right to unite with other small town and neighborhood merchants in order to live in competition with the large individual stores in the cities.

There has been a wholly inadequate presentation of the facts affecting a chaotic, distributive system, a system that has fallen far behind the system of production. This faulty system may be responsible for a lack of balance which is causing the difficulty economists so frequently point out between the over-production of our machine age and the inadequate facilities of our distributing devices. The facts should be understood. They have not been understood and have not been presented by the attorneys for the chains.

Apparently, from the briefs submitted in the Indiana case, the attorneys representing the taxpayer rested their case largely on the proposition of law that a classification based on the number of stores owned must be arbitrary and invalid. If the decision of the Supreme Court of Florida is upheld, the appellant will have no opportunity through competent testimony to prove the erroneous assumptions of an inexperienced witness on retailing, which must have affected the result in the Indiana case.

So we have this strange condition. In the Indiana case the attorneys for the chains assumed that no facts

were necessary to defeat a bad law. In this case, the Attorney General of Florida assumes that no facts are material in sustaining what he assumes to be a good law.

POINT III.

The Indiana chain store decision of this Court rests upon an erroneous assumption of facts.

Retailers, generally, are bewildered, not because of the abstract questions of law involved, but because of the assumed facts on which this anti-chain store legislation has been upheld are so contrary to the everyday knowledge of the retail trade. For example, it is said in the majority opinion of this Court in the Indiana case that chains are different because they have the advantages of warehousing. A very natural assumption is that warehousing is a sign of power and advantage which chains must enjoy because of their supposed volume of business. Warehouses are really the costly tools of the middleman, made more generally necessary years ago for the assemblage of merchandise from many small factories. Many chains do not use them (R., p. 42). It is obvious that before the concentration of production in big factories, merchandise had to be shipped to warehouses from small factories so as to be stored and sorted and assembled as to size, color, quality and quantity before distribution to the stores.

Obviously, since the great majority of all chains have ten stores or less per chain, they do not have sufficient volume to maintain their own warehouses (p. 11—Distribution No. R 36—United States Summary—Preliminary Causes of Distribution Report conducted by U. S. Department of Commerce).

This mistaken idea about the advantages to chains in warehousing can be exposed by a typical illustration.

Assume, which we believe to be true, that one company in North Carolina manufactures in one factory approximately 55% of all bath towels used in the United States, so that all of the customary sizes, colors and varieties are already assembled at one place. The waste of shipping towels from North Carolina to a variety of alleged chain store warehouses all over the country, only to be shipped back again over the identical routes to the stores, is obvious. Eliminating the warehouse eliminates at least one freight bill, one trucking, one handling, one interest and one insurance bill.

The tendency of the modern factory and modern store is to eliminate the warehouse entirely by the use of quick motor trucks, express, parcel post and fast freights which provide for weekly and even daily shipments direct from factory or farm to the store. Small parcels are travelling continuously, timed so that they may arrive according to the stores' needs, thus avoiding extra storing and handling costs. The modern factory is equipped to ship anywhere, any time. Many have hundreds of stalls or bins marked by state and city and the name of the customer, where goods are stored directly from the loom and cannery. They provide a continuous flow of goods to meet the orders scheduled to be sent as needed by the fastest and cheapest transportation.

It will be proved on the trial that the Professor's observations on his remaining thirteen points are no more accurate than his observations on warehousing as a characteristic advantage or difference of chain stores.

What is a chain? Merely a single Main Street store duplicated in neighboring towns or trading areas. Here and there in almost every town, an outstanding individual merchant feels the urge to expand. The only way open to him is to start another store in an adjoining small town. To that store he can take no so-called "chain" characteristics. If he is to be successful, he will merely

repeat in the neighboring town the same character of merchandising operation which he did at home in his first store. Reason rejects any other explanation of growth and success beyond the performance just stated. This simple explanation remains true whether the growth has been to six stores or to six hundred stores. Its essence throughout the period of any expansion must remain the standard of the individual merchant's performance in the first store.

Here we have a statute which provides that if small town merchants grow at all (sidewise, so to speak, from town to town, the only way small town merchants can grow), they must pay a tax which may run up to $50.00 per store, while their big city competitor regardless of growth who does all his business under one roof but who draws trade from every hamlet of the state, pays the paltry sum of Five Dollars. If a merchant grows only skyward under one roof and his gross sales and net income equal that of two thousand little country stores banded together as one operation, and even though this individual merchant has all of the superficial characteristics ascribed to chains which differentiate him from his little competitor, he is especially favored. Such a statute invites the big city merchants to add more lustre to the big city institutions at the expense of the country and small town stores by taking more trade from Main Street. Main Street was losing its business to the big cities by motor and train long before chains were important developments. Chains came (largely since 1920) to help the cooperatives, to restore trade to the small town and neighborhood trading areas, where it naturally belongs. Such statutes cripple the growth of all small stores in natural neighborhood trading areas and favors the big downtown stores of the cities.

There is no chain store entity that is a creature apart from a local store. Any so-called "chain" is merely the

sum total of a number of little stores. Some are successful. Some are not. The "chain" feature consists of the aggregate capital and surplus and net profits of a number of individual stores, less the individual losses of those stores. Each store, of course, has its own ledger accounts, as if it were a single store.

The burden of the chain store taxes must inevitably be borne by each store of the chain upon which the tax is levied and not by any general or central chain entity. The chain as an entity has no special capital, no stock of merchandise, no assets and liabilities apart from the stores. If a losing store in a chain cannot pay a chain store tax, who pays? The prosperous stores may be able to pay, the losing stores cannot; and there are always losing stores in every chain. These losing stores, even before the tax, are already on an unequal and subnormal basis, compared with the well trained army of successful independent and cooperative merchants.

Occasionally we find examples of promoters imbued with the popular idea that there is magic in so-called "chain store methods of doing business" which leads to immediate financial success. Many of the public having the same misconception supply the capital. But experience shows that chains which have been launched in this way have not been successful. The successful chains are those which have been built from the bottom up, and not from the top down. Successful chains in the last analysis are the extension of the efforts of a capable individual merchant.

It is true that chain groups of merchants having intelligent management have shown remarkable stability and ability to lower costs of merchandise to the consumer, in the same way that many individual merchants with similar intelligent management show stability and lower costs to the public. It is equally true that when there is a deviation from principles of sound merchandis-

ing, the result is disastrous, whether it be a chain or an individual merchant. It is common knowledge that during the past years many chains of this character have failed or discontinued doing business.

In the bankruptcy lists during the past two years are the names of some of the best known sources of the fallacious public impressions concerning chains. On the list is one famed because it had a reputation for using the stop-watch method of counting traffic per minute which passed a given point, thus devining the 100% locations for stores. So much "puffing" and propaganda regarding chains comes to an end but false public impressions remain.

POINT IV.

Many erroneous impressions regarding chain retailing will be corrected by the reports of "Census of Distribution," now being published by United States Department of Commerce for the first time.

The ordinary conception of chain retailing is formed naturally by everyday contacts. Those contacts create the impression that chains consist of food stores like Great Atlantic & Pacific Tea Company, Kroger, Safeway, Sanitary, First National, etc. The other conception of a chain is that it deals in five and ten cent and other low priced articles, and the familiar names of Woolworth, Kresge, Grant, Kress are suggested. Yet the food and five and ten cent store chains do but approximately forty per cent. of the chain retailing. Sixty per cent. of all chain retailing, or over Six Billion Dollars in sales, is done by comparatively small chain groups in something over 80 retail fields, including dry goods, shoes, cothing, drugs, building supplies, furniture, motor accessories, farm implements, restaurants, candy and fruit stores; in fact, almost every form of retail enter-

prise. But chains with such wide variety obviously do not compete with each other as a class, nor can they be compared with each other so as to be called a special class for tax purposes. A small fruit-juice and candy stand is a store, yet there is no difference between the tax that it must pay compared with a chain of department stores. They are all chains for the purpose of this tax which emphasizes the arbitrariness of the tax.

The names suggested above would also indicate to the casual observer that all chains are big chains, whereas,

80% of all chains operate less than 25 stores per chain;

70% of all chains operate less than 10 stores per chain;

45% of all chains operate 6 stores or less per chain.

(See p. 11, Census of Distribution, Bulletin R-36, U. S. Summary of Preliminary Census of Distribution.)

POINT V.

It being admitted for the purpose of this appeal that there are no factual differences between a single store merchant and a multiple store merchant, we submit that a classification based upon the number of roofs under which a merchant does business is arbitrary and invalid.

It is apparent that a classification based on no factual differences which has no relation to size, earnings or value of property and which imposes a far heavier burden by reason of this fact upon some merchants than upon other merchants of the same size having the same earning power, cannot be sustained. A sound statement of this fundamental principle of law is found in *People ex rel. Farrington* vs. *Mensching,* 187 N. Y., 8, in which Judge Vann, writing the opinion, said, on page 19:

> "Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation and value. A statute imposing such a tax would not give 'that equal protection and security' to which all, under like circumstances, are entitled 'in the enjoyment of their personal and civil rights.' "

The passage above quoted is directly applicable to the facts before the Court on this appeal. The farm having one field represents the big department store and the farm with the same acreage having several fields represents the country merchant who with diligence and persistence has extended his operation into say six or less stores in nearby towns, the size of almost half of the chains.

POINT VI.

The effect of validating a classification based upon one method of retail distribution as against all other methods is to hamper and possibly to destroy a method made necessary by present day conditions in order to stabilize industry and help cure overproduction.

Dr. Charles A. Beard, the well known economist and historian, recently pointed out in an article published in the New Republic on November 30, 1932, the probable effects of such legislation upon the problems of stabilizing industry in this country. A copy of his article is attached to this brief as Appendix B.

We quote in part from his article:

"It may be said, to be sure, that this anarchy is a good thing, that it is in keeping with the high tension of American individualism, but we cannot eat our cake and keep it. If there is to be planning or stabilization in industry, as liberals suggest, then it must have a firm basis in rationalized distribution—at the consumer's end of the line. If planning and stabilization are illusions, of course, it is proper to press for the dissolution of every industrial corporation that has risen above the level of the village smithy and for the disruption of every retail concern that owns more than one store. The futility of the first of these operations has been demonstrated over more than forty years of industrial concentration. Will your legislatures be able to destroy by taxation large-scale operations in retail business?

There is the question for 'liberal' economists to consider. There is the issue at stake in the coming contest in the retail field. There is no doubt about the battle lines. The Supreme Court has upheld the Indiana law imposing a relatively small progressive tax on concerns having more than one store. At a recent session of the same legislature a bill was introduced imposing a tax rising from $5 on one store to $500 on each store above five in number—a tax that would put many chain stores out of business. A still more drastic bill has been devised in California by initiative petition and is in circulation—a bill which would make it impossible for any person or concern to have more than one or two stores in the state.

All this is being done under the guise of taxation. The purpose is not revenue but the destruction of multiple retail establishments. It is not claimed that they are monopolies to be dissolved as contrary to public policy. They are not denounced as insanitary and subject to the police power. They are de-

cleared to be enemies of the public—especially local retail merchants—and are to be destroyed by heavy taxation.

There is the issue and 'liberals' who speak of planning should at least be aware of the implications involved in the conflict. If other legislation against multiple retail establishments is sustained and they are to be destroyed by law, then it should be recognized that the stabilization of industry will be rendered all the more difficult. It may be that economic anarchy is to be preferred above economic planning, but there ought to be no delusions about the tendencies of public measures bearing on the subject. In any case, the matter is too complicated for a snap judgment."

CONCLUSION.

It is submitted that the decision and judgment of the Supreme Court of Florida be reversed.

Respectfully submitted,

W. H. DANNAT PELL,
Counsel for Appellant,
J. C. Penney Company.

RALPH W. GWINN,
of Counsel.

APPENDIX A.

Planning and Chain Stores.

By Charles A. Beard.

It is repeatedly said that the "liberals" so-called are in a constant state of confusion with respect to policies and measures, ever contradicting themselves. While the general proposition may be left to philosophers for debate, in some particulars the statement is true. Illustrations are to be found on every hand. Liberals attack the courts for "usurping" the power to pass upon the constitutionality of legislation and then in the same breath assail the courts for not striking down laws directed against freedom of opinion. They object to judicial intervention in any form and yet praise the courts for their opinions upholding statutes enacted under "progressive" auspices, apparently on the assumption that plastering the rich and powerful is a good thing whatever the rich and powerful may be doing, and that the latter must always be operating contrary to the interest of the public or retarding the advance of the ideal commonwealth.

No better illustration of this condition of mind can be found than in the chorus of approval which went up from certain liberal circles when the Supreme Court of the United States recently upheld an Indiana statute designed to hamper chain stores by taxation. It was said with much jubilation that Justice Hughes and Justice Roberts were now on the popular side and that progressive legislation may expect a better fate in the future at the hands of the Supreme Court. Yet at the very same moment liberals were flirting with the idea of planning for business as a way out of the crisis.

Here then is the contradiction. How can anyone expect to "stabilize industry" and "plan production" with-

out considering the methods and machinery by which goods are distributed, without providing economic institutions for obtaining from the merchant on the very frontiers of distribution the data for continuous forecasting in various lines, without guaranteeing stability and rationalization in retail management? The answer is obvious. Planned production without rationalized retailing is an impossibility.

The strange thing in the situation is that economists should have neglected the retail industry in projects for planning. Yet perhaps it is not so strange after all that this aspect of the subject should not have received adequate consideration. The interests of economists has been primarily in production, capital and profits—with side glimpses at labor—and not primarily in the consumer whom the whole business is supposed to serve. At all events, the processes by which the needs of the consumer can best be met, sound consumer wants stimulated and consumer demand accurately forecast have not yet had the scientific examination which they deserve. It is an interesting commentary on the present state of the art of panning that Soviet Russia has been constantly harassed by this problem and last year sent to the United States an expert charged with the duty of studying the selling phase of rationalization.

Now it happens that the people in this country who are actually attacking the problem of rationalization in retailing are the managers of chain-store concerns. These establishments have grown up from the ground, from simple beginnings in one store, and are deeply rooted in the realism of distribution at the final end of the process—supplying the ultimate consumer. They are making use of the principle of the conservation of energy —the performance of retail services with the least expenditure of energy. They make direct contacts with manufacturers and eliminate as far as possible the waste

of middlemen and warehousing which add enormously to retail prices. They introduce the blessed word "stabilization" into the troubled retail business and, what is more important, the practice of stabilization by careful management. They avoid bankruptcy even in panics—at least so long as they keep out of the clutches of investment promoters.

On the other hand, it is notorious that retail business as historically practised in the United States has been characterized by opposite attributes on a large scale. It carries on its back a heavy load of middlemen. Its course is marked by receiverships and dissolutions. According to a recent survey, at least 50 percent of the grocery stores established in an Eastern city failed before the end of the first year. It is so conducted in small towns that, with the improvement of roads and automobiles, the department stores of neighboring cities are pressing local one-man stores to the wall and disintegrating community life in many parts of the country.

The path of the retail industry is strewn with wrecks. A clerk saves a few dollars. He starts a store, with the aid of a landlord having a room to rent and some credit from wholesalers and the local bank. If all goes well, he may build up a successful business and become a pillar of local society. But in innumerable cases he does not do well, ends in bankruptcy in fact, and his goods are thrown upon the market at ruinous prices disrupting the normal flow of business in the town. And thousands of these unhappy retailers, with their ups and downs, keep producers in a fog as to the demand for their goods and hence with regard to planning their output.

It may be said, to be sure, that this anarchy is a good thing, that it is in keeping with the high tension of American individualism, but we cannot eat our cake and keep it. If there is to be planning or stabilization in

industry, as liberals suggest, then it must have a firm basis in rationalized distribution—at the consumer's end of the line. If planning and stabilization are illusions, of course, it is proper to press for the dissolution of every industrial corporation that has risen above the level of the village smithy and for the disruption of every retail concern that owns more than one store. The futility of the first of these operations has been demonstrated over more than forty years of industrial concentration. Will our legislatures be able to destroy by taxation large-scale operations in retail business?

There is the question for "liberal" economists to consider. There is the issue at stake in the coming contest in the retail field. There is no doubt about the battle lines. The Supreme Court has upheld the Indiana law imposing a relatively small progressive tax on concerns having more than one store. At a recent session of the same legislature a bill was introduced imposing a tax rising from $5 on one store to $500 on each store above five in number—a tax that would put many chain stores out of business. A still more drastic bill has been devised in California by initiative petition and is in circulation—a bill which would make it impossible for any person or concern to have more than one or two stores in the state.

All this is being done under the guise of taxation. The purpose is not revenue but the destruction of multiple retail establishments. It is not claimed that they are monopolies to be dissolved as contrary to public policy. They are not denounced as insanitary and subject to the police power. They are declared to be enemies of the public—especially local retail merchants—and are to be destroyed by heavy taxation.

There is the issue and "liberals" who speak of planning should at least be aware of the implications involved in the conflict. If other legislation against mul-

tiple retail establishments is sustained and they are to be destroyed by law, then it should be recognized that the stabilization of industry will be rendered all the more difficult. It may be that economic anarchy is to be preferred above economic planning, but there ought to be no delusions about the tendencies of public measures bearing on the subject. In any case, the matter is too complicated for a snap judgment.

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CHARLES ELMORE CROP

Supreme Court of the United States

OCTOBER TERM, 1932

No. 301.

LOUIS K. LIGGETT COMPANY, a Corporation, et al.,
Appellants,

vs.

ERNEST AMOS, as Comptroller of the State of Florida, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF FOR APPELLEES

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TABLE OF CONTENTS

PAGE

Reference to Report of Case in Court Below 1

The Particular Statute Assailed and Involved 1

Controlling Questions Involved 4

1. Does Chapter 15624, Laws of Florida, Acts 1931, violate the due process clause or the equal protection of the laws clause of the Federal Constitution 4

2. Does Chapter 15624, Laws of Florida, Acts 1931, as administered by the Comptroller of the State of Florida violate any right guaranteed to the Appellants by the Constitution of the United States 4

Argument 4, 39

Point 1—Does Chapter 15624, Laws of Florida, Acts of 1931, violate the due process clause or the equal protection of the laws clause of the Federal Constitution 4

Point 2—Does Chapter 15624, Laws of Florida, Acts of 1931, as administered by the Comptroller of the State of Florida violate any right guaranteed to the Appellants by the Constitution of the United States 27

Conclusion 40

Appendix 41

PAGE

CASES CITED

Bell's Gap. R. R. Co. vs. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892 16

Brown-Forman Co. vs. Kentucky, 217 U. S., Text 573, 54 L. Ed. Text 887, 30 S. Ct. 578 9

Brown-Forman Co. vs. Kentucky, 217 U. S. 563, 54 L. Ed. 883 16

Canova vs. Williams, 41 Fla. 509, 27 So. 30 22

Erb vs. Morasch, 177 U. S. 584, 20 Sup. Ct. Rep. 819, 44 L. Ed. 897 25

Ferguson vs. McDonald, 66 Fla. 494, 63 So. 915 23

Great A. & P. Tea Co. et al vs. Maxwell, 284 U. S. 575, 76 L. Ed. 500 ..... 8, 11

Hump Hairpin Mfg. Co. vs. Emerson, 258 U. S. 290, 42 Sup Ct. Rep. 305, 66 L. Ed. 622 19

Hiers vs. Mitchell, 95, Fla. 346, 116 So. 81 34

Jerome H. Sheip Co. et. al vs. Amos, 100 Fla. 863, 130 So. 699 5

Lawrence vs. State Tax Com. 286 U. S. 276, 76 L. Ed. 1102 37

Louis K. Liggett vs. Amos, (Fla.) 141 So. 154 26

Mackay Tel and Cable Co. vs. Little Rock, 250 U. S. 94, 39 Sup. Ct. Rep. 428, 63 L. Ed. 863 25

Osborne vs. State, 33 Fla. 162, 14 So. 588 23

Panhandle Oil Co. vs. Miss., 277 U. S. 218, 48 S. Ct. 451 72 L. Ed. 857 18

PAGE

Sprout vs. South Bend, 277, U. S. 163, 48 Sup. Ct. Rep. 502, 72 L. Ed. 833 ..... 19, 24

Southwest Oil Co. vs. Texas, 217 U. S. 114, 54 L. Ed. 688. 16

State Board of Tax Com'rs, Indiana, vs. Jackson, 283 U. S. 527, 75 L. Ed. 1248 ..... 8, 10, 14, 16

State ex rel. Bonsteel vs. Allen, 83 Fla. 214, 91 S. 104, 26 A. L. R. 735 6

CONSTITUTION OF FLORIDA

Section 5, Art. IX 5, 22

Section 8, Art. IX 25

STATUTES OF FLORIDA

Chapter 15659, Acts 1931 17

Chapter 15788, Acts 1931 17

Chapter 4115, Acts 1893 23

Compiled General Laws, 1927, Sec. 1051 29

Compiled General Laws, 1927, Sec. 1061 31

Compiled General Laws 1927, Secs. 1062, 1066 32

Compiled General Laws 1927, Sec. 1064 33

Compiled General Laws 1927, Sec. 1149 28

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF FOR APPELLEES

REFERENCE TO THE REPORT OF THE CASE IN THE COURT BELOW.

The opinion of the Court below was filed April 4, 1932, and is cited Louis K. Liggett Company, et al., vs. Amos, State Comptroller, et al., 141 So. 153 (not yet printed in Florida Reports).

THE PARTICULAR STATUTE ASSAILED AND INVOLVED.

The entire statute under attack is printed in an appendix to this brief.

The Act was passed at an Extraordinary Session of the Legislature of Florida, 1931, and became Chapter 15,624

of the Laws of Florida. Its pertinent provisions may be summarized as follows:

Section 1 makes it unlawful for any person, firm, corporation, association or co-partnership, whether foreign or domestic, to operate, maintain, open or establish any store in this State without first having obtained a license so to do from the Comptroller of the State, or the Tax Collector of the county in which the same is located.

Section 2 relates to the manner and method of making application for the license required by Section 1.

Section 3 relates to the examination of the application and the issuance of the license required by the County Tax Collector, or Comptroller as the case may be.

Section 4 fixes the time for the expiration of licenses and relates to the requirement for renewal of same, the date on which the same shall lapse and imposes a penalty of 25% of the license tax for failure to renew the license on or before the 10th day of November next after the expiration of the license for the preceding fiscal year.

Section 5 of the Act fixes the annual license fee or tax imposed by the State for the privilege of opening, establishing, operating or maintaining stores or mercantile establishments in the State upon a graduated scale ranging from $5.00 for one store to $40.00 for each additional store in excess of 75 where all of such stores are located in one county, and/or $50.00 for each additional store in excess of 75 where the same are located in different counties.

Section 6 provides for the issuance of license on or after the first day of April of any fiscal year at one half of the full rate prescribed by Section 5 of the Act.

Section 7 makes the provisions of the Act applicable to every person, firm, corporation, co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership, or ultimately controlled or directed by one management or association of ultimate management.

Section 8 of the Act defines "store" as used in the Act to mean and include any store or stores, or any mercantile establishment or establishments owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership, or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail, but provides that the term "store" shall not include filling stations engaged exclusively in the sale of gasoline or other petroleum products.

Section 9 makes a violation of any of the provisions of the Act a misdemeanor and provides the punishment therefor.

Section 10 makes the County Tax Collector subject to removal from office for certain acts of commission or omission in relation to the issuance of license.

Section 11 imposes a County License Tax of 25% of the State License Tax upon each store as in said Act defined, and authorizes the municipalities of the State to levy a Municipal License Tax of 25% of the State Tax but provides that the tax levied by or for the counties and municipalities shall be graded only on the number of stores situated in such county or munici-

pality, respectively, notwithstanding the applicant may own other stores beyond the limits of such county or municipality.

Section 12 requires all licenses provided for in the Act to be issued by the County Judges of the several counties of the State and turned over to the County Tax Collector of their respective counties, and/or the Comptroller of the State of Florida, to be by them countersigned and delivered to the licensees upon the payment of the license tax required.

Section 13 relates to the fee to be charged by the County Judge of each county for his services in issuing the licenses.

Section 14 repeals all laws and parts of laws in conflict with said Act.

Section 15 provides a saving clause in case any Section, provision or clause in the Act is declared unconstitutional.

By Section 16 the Act became effective July 3, 1931.

CONTROLLING QUESTIONS INVOLVED.

1. DOES CHAPTER 15,624, LAWS OF FLORIDA, ACTS OF 1931, VIOLATE THE DUE PROCESS CLAUSE, OR THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE FEDERAL CONSTITUTION?
2. DOES CHAPTER 15,624, LAWS OF FLORIDA, ACTS OF 1931, AS ADMINISTERED BY THE COMPTROLLER OF THE STATE OF FLORIDA VIOLATE ANY RIGHT GUARANTEED TO THE APPELLANTS BY THE CONSTITUTION OF THE UNITED STATES?

ARGUMENT.

Point 1. DOES CHAPTER 15,624, LAWS OF FLORIDA, ACTS OF 1931, VIOLATE THE DUE PROCESS CLAUSE, OR THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE FEDERAL CONSTITUTION?

Article IX of the Constitution of Florida relates to taxation and finance.

Section 1 of Article IX of the Florida Constitution requires the Legislature to provide a uniform and equal rate of taxation, except as to intangible property and requires the Legislature to prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, educational, literary, scientific or charitable purposes. This requirement as to uniformity and equality in the rate of taxation has been uniformly construed by the Supreme Court of Florida to apply only to property taxes.

The authority for the Legislature to impose excise or license taxes is found in Section 5 of Article IX of the Constitution of Florida, which is in part as follows:

> "The Legislature may also provide for levying a special capitation tax, and a tax on licenses."

Chapter 15,624, Laws of Florida, Acts of 1931, was enacted in pursuance of the authority of that part of Section 5 of Article IX of the Constitution last above quoted.

The Supreme Court of Florida in the case of Jerome H. Sheip Company, et al., vs. Amos, State Comptroller, 100 Fla. 863, 130 So. 699, clearly distinguished the rule applicable in the imposition of excise or license taxes from that applicable to ad valorem or property taxes, as follows:

> "In the direct imposition of a State excise upon taxable privileges, the Legislature exercises a power of extensive scope. Organic requirements as to uniformity and valuation, applicable to ad valorem taxes, do not apply to excises, since the latter are not regarded as a 'tax' within the meaning of constitutional limitations requiring uniformity of rates and just valuations.

> Jackson v. Neff, 64 Fla. 326, 60 So. 350; Hiers v. Mitchell, 95 Fla. 345, 116 So. 81. In the imposition of excises, the only organic limitations upon the State are that due process, equal protection, and contract rights shall be observed, and that interstate commerce shall not be burdened nor federal functions interferred with. Therefore there must be a reasonable basis of classification, and there must be geographic, as distinguished from intrinsic, uniformity. Amos, v. Mathews (Fla.) 126 So. 308; Amos v. Gunn, 84 Fla. 285, So. 615; Jackson v. Neff, supra; Peninsular Casualty Co. v. State, 68 Fla. 411, 67 So. 165; Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 48 S .Ct. 451, 72 L. Ed. 857, 56, A. L. R. 583. See, also, Newell v. Green, 169 N. C. 462, 86 S E. 291. Unless the classification, or the amount of the tax, is purely arbitrary and unreasonable under every conceivable condition in practical affairs, the courts will not interfere."

The main attack made in the bill relates to the classification of stores as a basis for the tax levied and the controlling question to be determined on this appeal is whether the classification made by the Legislature is reasonable and based upon substantial differences between the businesses separately classified. Such difference may not be great and if the classification does not result in arbitrary discrimination, it is not a denial of due process or equal protection of the laws and the Court will not hold such classification invalid unless it clearly and unmistakably appears to be unreasonable and arbitrary. In State ex rel. Bonsteel v. Allen, 83 Fla. 214, 91 So. 104, 26 A. L. R. 735, after pointing out that the rule in Florida is somewhat more stringent than that applied in the Federal Courts in testing the constitutional validiy of Acts imposing excises, it is said:

> "While it is in the power of the courts to declare laws levying license taxes void because of the unreasonable and arbitrary exercise of the State's power, either in the classification or fixing the amount of license, such power will not be exercised unless the amount of the license tax is so great or the classification so palpably arbitrary to be beyond the necessities of the legislation, or the equivalent of the impairment of the constitutional rights of property, or tend to prevent a great number if not all persons from pursuing otherwise lawful occupations which do not impair public safety, public health or destroy property."

The degree of distinction between businesses, trades or occupations as a basis for classification in the imposition of excise taxes is a matter for legislative determination and if there is any substantial distinction it is sufficient as a basis for classification purposes. In other words, the fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction.

A very wide latitude of discretion must be conceded to the Legislature in the classification of occupations, trades or businesses in the imposition of excise or license tax, and unless such classification is purely arbitrary or capricious and not founded upon any substantial differences, the Court will sustain and uphold the same as a reasonable exercise of legislative power and discretion.

It is not the function of the Courts to review the wisdom of the means adopted by the Legislature in imposing excises. Courts deal with legislative power not wisdom. If the Court determines that the power to impose the excise exists in the legislative department, judicial duty is at an end.

In making classification for the purpose of imposing excise or license taxes it will be presumed that such classification was based upon a reasonable distinction, and that the Legislature had sufficient facts as evidence of the distinction or differences as a basis for the classification made.

Two cases have recently been before this Court involving attacks upon State statutes imposing excise or license taxes on chain stores, in each of which the statutes were upheld and the classifications made by the Legislature in each instance was sustained as being reasonable. I refer to the following cases:

> State Board of Tax Commissioners of the State of Indiana v. Jackson, 283 U. S. 527, 75 L. Ed. 1248, decided May 18, 1931;
>
> Great Atlantic & Pacific Tea Company, et al., v. Maxwell, 284 U. S. 575-6, 76 L. Ed. 500, decided Oct. 26, 1931.

The District Court of the United States for the Southern District of Indiana held the Indiana Chain Store statute unconstitutional and its decree was reversed by a 5 to 4 decision of this Court in State Board of Tax Commissioners of Indiana v. Jackson, *supra.*

The North Carolina Chain Store statute was held valid and constitutional by the Supreme Court of North Carolina in Great Atlantic & Pacific Tea Company, et al., v. Maxwell, 154 S. E. 838, from which an appeal was taken in this Court where the judgment of the North Carolina Supreme Court was affirmed by a memorandum decision in Great Atlantic & Pacific Tea Company v. Maxwell, 284 U. S. 575-6, 76 L. Ed. 500.

The Indiana statute prescribes a graduated scale of fees ranging from $3.00 for one store to $25.00 on each store in excess of 20.

The license fees under the North Carolina statute are not graduated but are the same on all stores regardless of number, being $50.00 on each and every store operated in excess of one.

The Florida statute here under attack (Chap. 15,624) is slightly different from the Indiana statute in that the graduated scale of fees applied to multiple or chain stores operated in different counties is slightly higher than that applied to the same number of stores operated in one county. If this distinction is based upon any substantial difference of advantage enjoyed by chain stores operating in different counties over those operating a like number of stores in the same county, then the classification is, in that respect, reasonable and should be sustained. The matter of distinction as a basis for classification was a question for legislative determination and in the absence of a contrary showing, it should be presumed that the Legislature found such facts to exist.

This Court discussing the discretion conceded to the legislative power of the States in the matter of classification as a basis for the imposition of an excise or license tax in Brown-Forman Co. v. Kentucky, 217, U. S. Text 573, 54 L. Ed. Text 887, 30 S. Ct. 578, said:

> "A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxes through an excise or license tax. If the selection or classification is neither capricious or arbitrary, and rests upon some reasonble consideration of difference or policy, there is no denial of equal protection of the law."

It is the privilege granted by the State to engage in and operate the particular line of business that is taxed, and if the privilege enjoyed by chain stores is greater than that enjoyed by single store operators, it is not unreasonable or arbitrary to require greater license fees for the enjoyment of the greater privileges.

The rule for legislative determination as to the value of privileges granted by the State and enjoyed by the licensee in making classification for the imposition of license taxes was stated by this Court in State Board of Tax Commissioners v. Jackson, 283 U. S. Text 541, 75 L. Ed. Text 1258, as follows:

> "In view of the numerous distinctions above pointed out between the business of a chain store and other types of store, we can not pronounce the classification made by the statute to be arbitrary and unreasonable. That there are differences and advantages in favor of the chain store is shown by the number of such chains established and by their astonishing growth. More and more persons, like the appellee, have found advantages in this method of merchandising and have therefore adopted it. What was said in Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 57 L. Ed. 730, 33 S. Ct. 441, *supra*, is quite applicable here;
>
> "The distinction obtains in every large city of the country. The reason for it must therefore be substantial, and if it be so universal in the practice of the business it would seem not unreasonable if it be adopted as the basis for governmental action.' "

This, as we construed it, in effect means that what is known, generally, is known to the Legislature and that the Legislature may take its general knowledge of facts and

conditions as a basis for its determination of the reasonableness of classifications made the basis for the taxation of privileges granted by it and the presumption attaches that in making such classifications the Legislature had before it knowledge of such conditions justifying the distinction made, and the burden is upon him who complains of the classification to clearly and unmistakably demonstrate that there was no reasonable basis for the distinction made and that such classification was purely arbitrary and capricious. In other words, the rule stated by the Court, as applied to the instant case, is that the fact of the growth and expansion of business and the increase in the number of stores operated is evidence that greater privileges are enjoyed by such expansion and that the Legislature may take this as a basis for making classifications in taxing such privileges.

The principle we are contending for is to the effect that there is a real and substantial difference between merchants who exercise the privilege of carrying on their business by means of mutiple or chain stores on the one hand and those who maintain and operate only one store, the general knowledge of which may be used by the Legislature as a basis for classification, and that the imposition of a license tax on the one class at a greater rate than is imposed on the other is not an unjust, unreasonable or arbitrary discrimination between the two classes, for the reason that merchants who operate multiple or chain stores and pay a higher tax therefor have, and exercise a more valuable privilege than those who operate only one store. This is the same principle adopted by the Supreme Court of North Carolina and approved by this Court. Thus in Great Atlantic & Pacific Tea Company, v. Maxwell, 154 S. E. 838, Text 843, affirmed by this Court in 284 U. S. 575-6, 76 L. Ed. 500:

"In view of the foregoing well settled principles of constitutional law, both state and federal, applicable to the question presented for decision by this appeal, we are of opinion that there was no error in the finding and conclusion of the court below that the classification made by the General Assembly of this State in Section 162, Special Laws of North Carolina, Session 1929, of the business of maintaining and operating branch or chain stores, as therein defined, exclusively for the purpose of taxation is neither unreasonable or arbitrary; that there is a real and substantial difference between merchants who exercise the privilege of carrying on their business in this State, by means of two or more stores, and those who maintain and operate only one store and that this difference appears on the face of the statute without regard to the findings of fact made by the Court; that the imposition of a license tax on the one class without the imposition of a like tax on the other class of merchants is not an unjust, unreasonable or arbitrary discrimination between the two classes, for the reason that merchants who are required to obtain licenses and to pay the tax, have and exercise a more valuable privilege than those who are required to do neither; that therefore, the statute is not in violation of either the State or Federal Constitution."

The same rule applied in the Indiana and North Carolina cases may be applied in the instant case in determining whether the Legislature was justified in making a distinction in the tax imposed on stores operated in one county and the same number operated in different counties.

If the Legislature is justified in assuming as a basis of of classification that an increase in the number of stores operated carries a corresponding increase in the privileges

granted, then on the same principle of reasoning it would be justified in taking the view that an operator of stores branching out in different counties has increased privileges over those enjoyed by operating the same number in the same county. In other words, it is reasonable to assume that if the same opportunity and advantages could be had by operating all stores in one county, where it would be easier, more convenient and economical to supervise such operation, that this would be done. On the other hand, it is reasonable to assume that the successful merachant distributes his stores out in different counties and centers of population only because he finds it to his advantage so to do. It necessarily requires greater time and expense in going to and supervising stores located in different counties of the State, and the successful business man would not voluntarily entail upon his business this additional expense were it not advantageous to do so.

It is not difficult to conceive some of the advantages to be had by operating stores in more than one county over the privileges enjoyed where the operation is confined to only one county. One illustration is, one of the greater territory to draw from, thus increasing the opportunities for a greater volume of business. If all the stores are located in the same county or community they are confined to the same territory from which to draw trade and become competitors with each other, whereas if the same number of stores are distributed and located in different counties the field for operation is correspondingly increased and the opportunity for a greater volume of trade and expansion of business enhanced. This distinction alone is sufficient for the basis of classification made in Chapter 15,624, Laws of Florida, Acts of 1931. The differences in the privileges enjoyed in the one over the other need not be great to justify a different classification, as was held by this Court

in State Board of Tax Commissioners of Indiana v. Jackson, *supra*:

> "It is not the function of this Court in cases like the present to consider the propriety and justness of the tax, to seek for motives or to criticize the policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the Legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear."

There is nothing in the Federal Constitution requiring the States to adopt an iron rule of equality in taxation, nor to prevent variety or differences in taxation, nor to prohibit the selection of subjects or the classification for taxation purposes of properties, businesses, trades, callings or occupations. Thus in State Board of Tax Commissioners of Indiana v. Jackson, *supra*:

> "The principles which govern the decisions of this Court are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, nor discrimination in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings or occupaions."

By way of comparison the scale of fees fixed in the Florida statute herein attacked (Chap. 15,624) are somewhat higher than those fixed in the Indiana statute, which was upheld in State Board of Tax Commisisoners of Indiana v.

Jackson, *supra,* but on the average are very much less than the tax imposed by the North Carolina statute and upheld by the Supreme Court of that State in Great Atlantic & Pacific Tea Company, et al., v. Maxwell, 154 S. E. 838, and which case was by this Court affirmed in 284 U. S. 575-6, 76 L. Ed. 500. It is only in the last bracket in Section 5 of the Florida statute, *supra,* that the tax on stores located in different counties reaches the level fixed by the North Carolina statute on each store in excess of one, to-wit: $50.00; and under the Florida statute this tax of $50.00 applies only to the stores operated in different counties in excess of 75. To use Table 4 in the brief for appellants, illustrating the average tax per store on 226 stores operated in different counties, it appears that the average on each store is only $42.76, whereas under the North Carolina statute the tax imposed on each store in excess of one is $50.00.

This Court is not concerned with the policy or wisdom of legislation but only with the power of the Legislature to impose the tax complained of, and these comparisons are made merely for the purpose of demonstrating that while the tax under the Florida statute exceeds that imposed by the statute of Indiana yet on the whole it is less than that fixed by the General Assembly of North Carolina, and we think it is fairer.

If the multiplication and growth in the number of stores operated is an evidence of increasing privileges enjoyed, then it is fair to tax those privileges on a graduated scale to the extent of and in proportion to the development and expansion of the business. It is to be remembered, however, that there is no iron rule in such matters, the only question being as to the reasonableness of the classification.

THERE IS NO UNLAWFUL DISCRIMINATION IN FAVOR OF FILLING STATIONS.

The contention is made by Appellants that the Act (Chap. 15,624) discriminates unlawfully in favor of filling stations by reason of the following proviso in Section 8 of the Act, to-wit:

> "Provided, however, that the term 'store' shall not include filling stations engaged exclusively in the sale of gasoline and other petroleum products."

Under the rule imposing excise or license taxes that the Legislature may make reasonable classifications, it is also well settled that it may exempt certain classes of businesses, trades or occupations from the payment of such tax, the only requirement being that the tax imposed must apply alike to all in the same class.

> State Board of Tax Commissioners of Indiana v. Jackson, *supra;*
>
> Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892;
>
> Southwest Oil Co. v. Texas, 217 U. S. 114, 54 L. Ed. 688;
>
> Brown-Forman C. v. Kentucky, 217 U. S. 563, 54 L. Ed. 883.

Aside from the rule just stated we can not escape the observation that the provision excluding filling stations, engaged exclusively in the sale of gasoline and other petroleum products, from the operation of the tax imposed under Chapter 15,624 does not discriminate in favor of filling stations, for the reason that this exclusion leaves filling stations subject to the tax imposed upon the sale of gasoline and other like products of petroleum, which tax in propor-

tion to the value of the goods sold is far in excess of that imposed by Chapter 15,624.

The pertinent provisions of Chapter 15,659, Laws of Florida, Acts of 1931, relating to the tax imposed on filling stations, are as follows:

> "Section 1. Every dealer in gasoline or other like products of petroleum in this State, under whatever name designated, shall pay a license tax of Five Dollars ($5.00) to the State, and in addition thereto, a tax herein termed 'gas tax' of six (6c) cents per gallon for every gallon of gasoline or other like products of petroleum sold by him, and upon which the tax herein provided has not been paid, or the payment whereof has not been assumed by a person preceding him in the handling of said lot of products, such tax of six (6c) cents per gallon being made up of two separate taxes, * * *"

In addition to the tax imposed on filling stations under the provisions of Chapter 15,659, Laws of Florida, Acts of 1931, an additional tax of 1c per gallon is imposed by Chapter 15,788, Laws of Florida, Acts of 1931, the pertinent provisions of which are as follows:

> "Section 1. That every dealer in gasoline or other like products of petroleum under whatever name designated in this State, in addition to all other taxes required by law shall pay an additional tax of one (1) cent per gallon for every gallon of gasoline or other like products of petroleum, under whatever name designated, sold by him on which the tax herein provided has not been paid or the payment whereof has not been assumed by a person preceding him in the handling of said lot of products." * * *

Thus under the Florida law dealers in gasoline and other like products of petroleum pay a tax of $5.00 on each filling station operated, and in addition thereto 7c per gallon on each gallon of gasoline or other like products of petroleum sold.

These latter Acts relating to dealers in gasoline were also enacted by the Legislature of 1931. In addition to the tax of $5.00 for each filling station and 7c a gallon on each gallon of gasoline sold under the Florida statute, the Federal Revenue Act of 1932 imposes a tax of 1c per gallon on each gallon of gasoline sold, making in all 8c per gallon exacted from operators of filling stations in addition to $5.00 flat fee for each filling station operated.

Considering the amount of the tax imposed, it readily appears that the operator of filling stations is taxed far in excess of the tax imposed on operators of stores under the provisions of Chapter 15,624, and that the discrimination, if any, is against the filling station operator rather than in his favor.

It may be argued that the gasoline tax is passed on to and paid by the consumer as was held by the Court in Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, but the same argument can be applied as to the tax imposed on stores under the provisions of Chapter 15,624. The Legislature placed the tax in each case upon the dealer, and it is immaterial to a consideration of the questions involved in this case who ultimately pays the tax. The Legislature evidently felt that filling stations were paying their portion of taxes and they should not be further burdened. And whether the tax is paid by the dealer or the consumer, the fact is that gasoline produces more revenue than any other commodity of commerce under our system of taxation.

CHAPTER 15,624, LAWS OF FLORIDA, ACTS OF 1931, DOES NOT BURDEN INTERSTATE COMMERCE.

A State excise tax which affects inter-state commerce, not directly but incidentally and remotely, is valid where it is clear that it is not interposed with the covert purpose or with the effect of defeating Federal constitutional rights.

> Hump Hairpin Mfg. Co. v. Emerson, 258 U. S. 290, 42 Sup. Ct. Rep. 305, 66 L. Ed. 622.

A State may require payment of an occupation or license tax from one engaged in both intra-state and inter-state commerce and delegate the same powers to its municipalities.

> Sprout v. South Bend, 277 U. S. 163, 48 Sup. Ct. Rep. 502, 72 L. Ed. 833.

The bill in this case alleges that one of the appellants stores goods in warehouses located in Florida for distribution to points both in and out of the State, and it is claimed that the Act burdens inter-state commerce in that appellant is required to pay a license tax based upon the value of the goods store in warehouses in the State for distribution to points outside the State, as well as supplying the stores operated in the State. In this appellants have clearly misconceived the plain intent and scope of the Act.

By Section 1 of the Act it is made unlawful only for any person, firm, corporation, association or co-partnership, whether foreign or domestic, to operate, maintain, open or establish stores in this State (Florida).

The first paragraph of Section 5 of the Act requires that every person, firm, corporation, association or co-partnership opening, establishing, or maintaining one or more stores or mercantile establishments within this State (Flor-

ida), under the same general management, supervision, or ownership, shall pay the license fee thereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments.

Section 2 of the Act requires an application by any person, firm, corporation, association or co-partnership to operate, maintain, open or establish a store in this State (Florida), such application to be made on the form prescribed and furnished by the Comptroller of the State of Florida and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license and the name of the store and location and the full actual value of the stock of goods, wares, merchandise and commodities from which sales are to be made, including all goods, wares, merchandise and commodities owned by the applicant and held in storage to be sold in or through such store.

The last paragraph of Section 5 of the Act imposes a tax of $3.00 for each and every One Thousand Dollars ($1,000.-00) of value of stock carried in each store for sale in such store.

It is contended that by reason of the two latter provisions the appellants are required to pay the tax on goods stored in warehouses in Florida, a part of which may be distributed to points out of the State. No such requirement can be read into the Act. The provision requiring the application to show the full actual value of the stock of goods, wares, merchandise and commodities from which sales are to be made, including all goods, wares, merchandise and commodities owned by the applicant and held in storage to be sold in and through such stores refers and relates to those goods, wares, merchandise and commodities held in storage to be sold in or through the store for opera-

tion of which the application is made, to-wit: A store in this State (Florida).

The tax of $3.00 for each and every One Thousand Dollars ($1,000.00) of value of stock carried in each store or for sale in such store, refers to the store for which the license tax is imposed in the first paragraph of Section 5 of the Act, to-wit: "Store or mercantile establishments within this state" (Florida).

There is no where in the Act any provision imposing a tax upon the value of the stock carried except stock carried in stores or mercantile establishments in the State of Florida for sale in such store.

If, however, the contention of appellants on this point were true that the tax attaches on goods stored in the State for distribution to points outside the State, such circumstances would affect interstate commerce only incidentally and remotely and would not render the Act invalid. The main purpose and intent of the Act was and is to impose a license tax for revenue purposes upon the business of operating stores or mercantile establishments only in the State, and no where in the entire Act is to be seen any intent on the part of the Legislature to interfere with or regulate inter-state commerce.

MUNICIPALITIES MAY LAWFULLY IMPOSE A LICENSE TAX OF 25% OF THE STATE TAX IMPOSED BY CHAPTER 15,624.

Chapter 15,624, Laws of Florida, Acts of 1931, is further attacked by reason of the provisions of Section 11 thereof, which imposes a County license tax of 25% of the State license tax upon each store, as in said Act defined, and which authorizes each incorporated municipality of the State to levy a municipal tax of 25% of the State tax imposed by said Act. It is provided in Section 11 of the Act

that the tax levied by or for the several counties and municipalities shall be graduated only on the number of stores situated in such county or municipality, respectively, notwithstanding the applicant may own other stores beyond the limits of such county or municipality as the case may be.

Section 5 of Article IX of the Constitution of Florida, which reads as follows:

> "The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation. But the cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits. The Legislature may also provide for levying a special capitation tax, and a tax on licenses. But the capitation tax shall not exceed one dollar a year and shall be applied exclusively to common school purposes."

has been construed by the Supreme Court of Florida as authority for legislative delegation to the municipalities to select the occupations upon which license taxes shall be imposed for municipal purposes, and the right to fix the amount of license taxes imposed by them. The Act under consideration, however, limits the amount of the county and/or municipal tax to 25% to that imposed by the Act for State purposes, whereas most of the License Tax Acts of Florida authorize the municipalities to impose like taxes in the amount not exceeding fifty per cent (50%) of the State tax.

In Canova v. Williams, 41 Fla. 509, 27 So. 30, the State Supreme Court, in construing the provisions of Section 5

of Article IX of the Florida Constitution, held that under the provision that the Legislature may provide for the levying of a tax on licenses by counties, incorporated cities or towns, the Legislature may delegate to the cities and towns the right to select the occupations upon which they may impose license taxes for municipal purposes, and the right to fix the amount of license taxes to be imposed by them.

In Ferguson v. McDonald, 66 Fla. 494, 63 So. 915, it was said that there is no express limitation upon the Legislature's power to authorize a municipality to levy a license tax other than it shall not violate a fundamental law.

The General Revenue Law of Florida, Chapter 4115, approved June 2, 1893, imposed license taxes for the privilege of engaging in the various businesses, professions and avocations mentioned in said Act, and authorized the counties and incorporated cities and towns to impose a like tax of as much as fifty per cent. (50%) of the State tax thereby imposed. This Act was upheld by the Supreme Court of Florida in Osborne v. State, 33 Fla. 162, 14 So. 588, where in discussing the intra-state character of the Act it was held that a State statute which imposes a tax in general terms on the doing of specified kinds of businesses or the pursuit of designated occupations in the State and requires that a license shall be taken out before any such business or avocation shall be done or engaged in, should not be construed to apply to any business of the kind that may constitute inter-state commerce, but only to a business that is domestic or state commerce and to persons engaged or intending to engage in such domestic or state business. In discussing the requirement for the payment of county and municipal taxes, in addition to the State tax imposed by the Act, the Court said:

"Any county may impose on a company doing business within its limits a license tax of not more than 50 per cent. of the state tax, and thus require the company to pay it not more than 50 per cent. of the amount such company has to pay to the state as a license tax for doing business at any city, town, or village, within the provisions of the act. If one company is doing business in, say, three places, one of which belongs to one class, another to another class, and the third to still another, the county may impose a tax on the company for each of the three places, not exceeding 50 per cent. of the amount of the state tax for that place. Likewise, any incorporated city or town may impose on any such company doing business within its limits a municipal license tax, not exceeding 50 per cent. of the state license tax imposed upon it for that place by the statute. Whether or not this construction of the statute will result in rendering it impossible for express companies to carry on within our borders business that is local to the state is a consideration for the lawmaking power, but it cannot be invoked properly to influence a construction that is contrary to the plain meaning of the statute, made more palpable still by a comparison of it with former legislation as to the same matter."

The power of legislative delegation to municipalities to regulate and tax businesses, occupations and avocations within such municipalities on a reasonable basis with like regulations and taxes imposed for State purposes, has been recognized and sustained by this Court.

Sprout v. South Bend, 277 U. S. 163, 48 Sup. Ct. Rep. 502, 77 L. Ed. 833;

Erb v. Morasch, 177 U. S. 584, 20 Sup. Ct. Rep. 819, 44 L. Ed. 897;

Mackay Tel. & Cable Co. v. Little Rock, 250 U. S. 94, 39 Sup. Ct. Rep. 428, 63 L. Ed. 863

We respectfully submit that the tax imposed for county purposes and the tax authorized to be imposed for municipal purposes under Section 11 of the Act is very reasonable in amount It is to be noted that such tax, whether county or municipal, is based only on the number of stores situated in the particular county or municipality, and can not be calculated upon the basis of the number of stores operated by the licensee in different counties. Therefore, the argument against the State tax imposed being increased by reason of the operation of stores in different counties of the State does not and can not be applied to the county and municipal tax imposed and authorized by Section 11 of the Act.

CHAPTER 15,624 DULY AND REGULARLY ENACTED AS REQUIRED BY THE CONSTITUTION OF FLORIDA.

It is contended that Chapter 15,624 was enacted in violation of Section 8 of Article IV of the Constitution of Florida in that certain amendments thereto adopted in the Senate were not adopted by a two-thirds vote, neither was the subject matter of said Act embraced within the Governor's Proclamation calling the Legislature in Extraordinary Session at which said Act was passed.

Section 8 of Article IV of the Constitution of Florida is as follows:

"The Governor may, on extraordinary occasions, convene the Legislature by proclamation, and shall in his proclamation state the purpose for which it is to

be convened, and the Legislature when organized shall transact no Legislative business other than that for which it is especially convened, or such other Legislative business as the Governor may call to its attention while in session, except by a two-thirds vote of each house."

In construing Section 8 of Article IV of the State Constitution and in disposing of the contention of appellants just stated the Supreme Court of Florida in Louis K. Liggett Company v. Amos, 141 So. 154 (not yet printed in Florida reports), said:

"Section 8 of Article 4 of the Constitution provides for calling the Legislature in extraordinary session, and limits legislative business transacted at such session to that stated in the proclamation of the Governor, calling the session or that called to the attention of the Legislature while in session or that initiated while in session by a vote of two-thirds of each house. We think the subject matter of Chapter 15,624 was fully comprehended in the proclamation of the Governor calling the Legislature in extraordinary session, but, if it was not so comprehended, the record discloses that both the House of Representatives and the Senate agreed by a two-thirds vote to receive and consider committee substitute for House Bill 8-X which was finally adopted and became Chapter 15,624. The two-thirds vote required by Section 8 of Article 4 applies only to the matter of taking up 'legislative business' for consideration not embraced in the Governor's proclamation or called by him to their attention while in session. After agreeing by two-thirds vote to consider any 'legislative business,' it then takes the regular

course under the rules, and may be amended, adopted, or rejected by a majority vote. For all the record shows, Chapter 15,624 was adopted by a two-thirds vote."

Chapter 15,624 was enacted as a revenue measure and its subject matter was clearly within the purview of the Executive Proclamation calling in session the Legislature at which said Chapter was enacted.

The Legislature is not confined to matters stated in the Governor's Proclamation but it may judge for itself the matter of importance and need for legislative action when convened in Extraordinary Session, provided the proposed legislation is initiated upon the concurrence of two-thirds of each house. In other words, the requirement for a two-thirds vote relates only to the matter of taking up business not called to the attention of the Legislature by the Governor and does not refer to or require a two-thirds vote on each and every step taken in enacting laws after the same has been initiated by a two-thirds vote. It is respectfully submitted therefore, that there is nothing in this contention of appellants.

Point 2. DOES CHAPTER 15,624, LAWS OF FLORIDA, ACTS OF 1931, AS ADMINISTERED BY THE COMPTROLLER OF THE STATE OF FLORIDA VIOLATE ANY RIGHT GUARANTEED TO THE APPELLANTS BY THE CONSTITUTION OF THE UNITED STATES?

It is claimed by appellants (printed record, pages 49-51) that the Comptroller of Florida, under the advice of the Attorney General, is undertaking to administer Chapter 15,624 in a manner so as to create sundry exemptions and exceptions as to certain merchants, which exemptions and exceptions are alleged to be wholly unwarranted and to deprive appellants of the equal protection of the law con-

trary to Sections 1, 4 and 12 of the Florida Declaration of Rights and contrary to the Fourteenth Amendment to the Federal Constitution. The only specific instances enumerated in the bill relate to exemption and exception of furniture dealers and dealers in tires and tubes from the tax imposed by Chapter 15,624.

It is alleged in the complaint (printed record, page 53) that this classification by the Comptroller of furniture dealers and dealers in tires and tubes for the imposition of license taxes severally has no reasonable basis and no just relation to the subject matter to which applied, and discriminates unjustly and arbitrarily in derogation of Sections 1, 4 and 12 of the Declaration of Rights of the Florida Constitution and in derogation of the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Federal Constitution.

Furniture dealers and dealers in tires and tubes are separately classified under the General Laws of Florida for the imposition of license taxes and the construction placed upon Chapter 15,624 by the Comptroller with reference to such dealers is in line with the policy of the Legislature of Florida against double taxation.

The license tax imposed upon furniture dealers under the General Laws of Florida is prescribed in Section 1149 of the Compiled General Laws of Florida, 1927, as follows:

> "1149. (893) FURNITURE DEALERS.—Dealers in furniture, with a capital of seventy-five thousand dollars or more, shall pay a license tax of fifty dollars; with a capital less than seventy-five thousand and not less than fifty thousand dollars, shall pay a license tax of thirty-five dollars.
>
> "With a capital less than fifty thousand and not less than twenty-five thousand dollars, shall pay a license

tax of twenty dollars, and with a capital less than twenty-five thousand dollars, shall pay a license tax of ten dollars: Provided, that this does not apply to persons paying a merchant's license."

Thus the tax imposed upon this particular class of dealer is fixed upon a graduated scale of from $10.00 to $50.00 according to capital invested in such business, which scale is in line with that imposed upon chain stores under Section 5 of Chapter 15,624. In addition to the State license tax imposed upon furniture dealers by Section 1149 of the Compiled General Laws of Florida, 1927, Section 1051 of the Compiled General Laws of Florida, 1927, further imposes upon such dealers a county license tax of 50% of the State License Tax and authorizes incorporated cities and towns to impose such further license taxes of the same kind upon such dealers not to exceed 50% of the State License Tax. It thus appears that the county license tax imposed upon furniture dealers and that which the municipalities are authorized to impose is double that imposed and authorized to be imposed by Chapter 15,624 for the same purposes.

Section 1051 of the Compiled General Laws of Florida, 1927, is as follows:

"1051. (804) COUNTY LICENSES LEVIED; CITY LICENSES, AMOUNT.—In every case, not otherwise provided in this Chapter, a county license tax of fifty per cent. of the State license tax is hereby levied and imposed upon any business, profession or occupation mentioned in this chapter and the tax collector of each county in this State is hereby authorized and directed to collect such county license tax when the business, profession or occupation is engaged in, conducted or carried on in any such county and all of the penalties

prescribed by this Chapter for the non-payment of license taxes or for doing business without a license shall extend to and apply to county license taxes whether imposed by this Chapter or any law of the State of Florida: Provided, that incorporated cities and towns, may impose such further license taxes of the same kind upon the same subjects as they may deem proper, unless otherwise provided in this Chapter, but the license taxes so imposed shall not exceed fifty per cent of the State license tax, except as otherwise authorized by law."

Sections 1051 and 1149 of the Compiled General Laws of Florida, 1927, were originally enacted as a part of one and the same Act of the Legislature, to-wit: Chapter 6421, Laws of Florida, Acts of 1913. Section 1051, Compiled General Laws of Florida, being the entire Section 2 of said Chapter 6421, and Section 1149, Compiled General Laws of Florida, being a part of Section 23 of said Chapter 6421, Acts of 1913. Thus it conclusively appears that the county license tax of fifty per cent. (50%) imposed by Section 2 of Chapter 6421, Acts of 1913, which is now Section 1051 of the Compiled General Laws of Florida, and the authority to municipalities to impose a like tax for municipal purposes applies to furniture dealers taxed for State purposes by Section 23 of Chapter 6421, Acts of 1913, which is now Section 1149 of the Compiled General Laws of Florida, 1927.

The license tax imposed upon tire and tube dealers by the General Laws of Florida is upon a graduated scale ranging from Five Dollars ($5.00) to Eighty Dollars ($80.00) according to the population of the City or town in which such business is located and conducted. The State license tax of those engaged in the automobile tire and tube busi-

ness is found in Section 1061 of the Compiled General Laws of Florida, 1927, as follows:

"1061. AUTOMOBILE TIRE AND TUBE DEALERS; STATE TAX.—There is hereby imposed and levied on every person, firm or corporation engaged in the automobile tire and tube business in the State of Florida, a State license tax for each place of business as follows:

"In cities and towns of less than one thousand population, three dollars.

"In cities and towns of less than two thousand population, and more than one thousand population, five dollars.

"In cities and towns of less than five thousand population and more than two thousand population, ten dollars.

"In cities and towns of five thousand population, and less than fifteen thousand population, twenty dollars.

"In cities and towns of fifteen thousand population and less than thirty thousand population, thirty dollars.

"In cities and towns of thirty thousand population and less than fifty thousand population, forty dollars.

"In cities and towns of fifty thousand population, and less than seventy-five thousand population, sixty dollars.

"In all cities and towns of over seventy-five thousand population, eighty dollars.

"Each person, firm or corporation so engaged in such business is hereby required to take out a State license for each place of business and to pay the State license tax herein required and levied for each place of business."

Section 1062 of the Compiled General Laws of Florida, in addition to the State tax imposed by Section 1061, imposes a county tax of fifty per cent. (50%) of the State license tax upon tire and tube dealers.

Section 1062 of the Compiled General Laws of Florida, is as follows:

> "1062. SAME; COUNTY TAX.—In every case where a license fee or tax is imposed in the preceding section, a county license tax of fifty per cent. of the State license tax is hereby levied and imposed. Each person, firm or corporation so engaged in such business is hereby required to take out the county license and to pay the county license tax hereby imposed and levied for each place of business."

Section 1066 of the Compiled General Laws of Florida defines tire and tube dealers, as follows:

> "1066. SAME; WHO ARE AUTOMOBILE TIRE AND TUBE DEALERS.—Every person, firm or corporation who buys automobile tires and tubes or either for resale, or who is engaged in selling automobile tires and tubes or either, whether as a separate and independent business or in connection with any other business, is hereby declared to be an automobile tire and tube dealer."

Sections 1061, 1062 and 1066 of the Compiled General Laws of Florida, 1927, were originally enacted as Sections 1, 2 and 6, respectively, of Chapter 12,412, Laws of Florida, Acts of 1927.

It thus appears that the maximum State tax imposed upon tire and tube dealers, under the quoted provisions of the General Laws of Florida, exceeds the maximum State

tax imposed under the graduated scale of Chapter 15,624 upon chain stores by Thirty Dollars ($30.00) and in addition to the State tax, tire and tube dealers are required to pay a county tax of fifty per cent. (50%) of the State tax as against the requirement that chain stores pay only twenty-five per cent. (25%) for such purposes.

Section 1064 of the Compiled General Laws of Florida, which was originally enacted as Section 4 of Chapter 12,412, Laws of Florida, Acts of 1927, defnies the word "population" as used in Section 1061, Compiled General Laws, as a basis for the imposition of the license tax imposed upon tire and tube dealers, as follows:

> "1064. SAME; 'POPULATION' DEFINED. The word 'population' in Section 1061 shall mean the population shown by the last preceding State or Federal census."

The Court will take judicial notice of the Federal Census report for the year 1930, which shows that Florida has three cities whose population exceeds seventy-five thousand (75,000), to-wit: Jacksonville, Miami and Tampa. So the State license tax imposed upon tire and tube dealers in those three municipalities is Eighty Dollars ($80.00) on each place of business, or almost double that imposed by Chapter 15,624 upon chain stores as shown by the illustration for comparison purposes made in the brief of appellants in case of 226 chain stores located in different counties of the State. In addition to the State tax required of tire and tube dealers located in Jacksonville, Miami and Tampa they must also pay a county tax of fifty per cent. (50%) of the State tax on each place of business or Forty Dollars ($40.00), making a total of One Hundred and Twenty Dol-

lars ($120.00) paid by tire and tube dealers on each place of business in those three cities.

The Court's attention is further respectfully directed to the provisions of Section 1066 of the Compiled General Laws of Florida, above quoted, which requires the payment of the State and county license tax imposed by Sections 1061 and 1062, respectively, of the Compiled General Laws of Florida, upon tire and tube dealers, whether as a separate or independent business or in connection with any other business. To illustrate, if a filling station operator is engaged in selling tires and tubes in addition to gasoline and other petroleum products, he must pay a flat tax of Five Dollars ($5.00) for operating the filling station and 7c per gallon State tax and 1c per gallon Federal tax on each gallon of gasoline sold, and in addition must pay the State and county license tax imposed by Sections 1061 and 1062 of the Compiled General Laws of Florida, for the privilege of selling tires and tubes.

The constitutionality of the Florida Tire and Tube Dealer's License Tax Act (Chapter 12,412, Laws of Florida, Acts of 1927, the same having been brought forward as Sections 1061-1066, inclusive, of the Compiled General Laws of Florida, 1927) was upheld b ythe Supreme Court of Florida in Hiers v. Mitchell, 95 Fla. 346, 116 So. 81, by a unanimous decision.

We have pointed out and set forth provisions of the General Laws of Florida, relating to the imposition of license taxes upon furniture dealers and dealers in tires and tubes in which they are separately classified for the purpose of showing:

(a) The reasonableness of the classification made of and the taxes imposed upon such dealers, as compared with chain stores under the Act attacked in this case, and

(b) To show that the Act of separately classifying furniture dealers and dealers in tires and tubes, and the imposition of license taxes on such dealers computed on the basis peculiar to the particular business, was by the Act of the Legislature and not by the Comptroller in administering the taxation laws.

The administrative officer takes the taxation laws as a whole and administers them according to the intent of the Legislature gleaned from a consideration and comparison of all such provisions of law and not from some particular or isolated provision, and that has been done by the Comptroller in dealing with the different classes of business mentioned by appellants in their complaint and in exacting the taxes applicable to each particular class.

Chapter 15,624, the constitutional validity of which is attacked in this case, does not directly repeal any provision of the General Laws of Florida relating to the separate classification of and imposition of license taxes upon furniture dealers and dealers in tires and tubes, and it can not be said that Chapter 15,624 by implication repeals the provisions of the general law in relation to the separate classification and taxation of the business of dealing in furniture and tires and tubes, unless the legislative intent to repeal such provisions clearly appears from a fair reading and interpretation of Chapter 15,624. The Courts do not favor repeal by implication.

If the Legislature had intended to repeal provisions of the General Law relating to the classification and taxation of the business of dealing in furniture and tires and tubes, it would have been easy to have said so in the provisions of Chapter 15,624, and since there is no expression to that effect the presumption is that it was not so intended.

The Legislature, by the enactment of Chapter 15,624, was dealing with merchants generally as theretofore dealt with by the general license taxation laws of the State, and not those separately classified and taxed, such as furniture dealers and dealers in tires and tubes, and the general repealing clause contained in Section 14 of Chapter 15,624, repealing all laws and parts of laws in conflict with said Act, was intended and does apply only to those provisions of the general license tax laws theretofore in force and applicable to merchants generally as a general class, and was not intended to and does not repeal those provisions of the general laws specially classifying and taxing particular classes of business, such as furniture dealers and dealers in tires and tubes.

What we have heretofore said regarding the legislative power to make clasisfication of businesses, professions and occupations in imposing excise or license taxes, and the authorities cited is applicable to the separate classification and taxation of furniture dealers and dealers in tires and tubes.

To hold the provisions of Chapter 15,624 applicable to furniture dealers and dealers in tires and tubes would subject those dealers to double taxation for the privilege granted by the State, a result not intended by the Legislature and one to be avoided by the Courts if possible.

In discussing distinctions made in classification of business by the Legislature of Mississippi and imposing excise or license tax on such business and the policy adopted generally by the State of avoiding double taxation, this Court, in sustaining an Act of the Legislature of Mississippi taxing the income of individuals derived from business done outside the State and exempting the income of domestic corporations from business carried on outside the State, in

Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. Ed. 1102, said:

> "The statute relieves domestic corporations from the tax only in so far as their income is derived from activities carried on outside the state. The appellant is thus compelled to pay a tax from which his competitors, if domestic corporations, are relieved, and this, it is urged, is so plainly arbitrary as to infringe the equal protection clause.
>
> "But, as there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates, acceptance of this contention would relieve the appellant from the burden which rests on him overcome the presumption of facts supporting constitutionality, which attaches to all legislative acts, and would require us to assume that there is no state of facts reasonably to be conceived which could afford a rational basis for distinguishing, for taxation purposes, between income of individuals and that of domestic corporations, derived from business carried on without the state. Lindsley v. National Carbonic Gas Co. 220 U. S. 61, 78, 79, 55 L. Ed. 369, 377, 378, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Rast v. Van Deman & L. Co. 240 U. S. 342, 357, 60 L. Ed. 679, 687, L. R. A. 1917A, 421, 36 S. Ct. 370, Ann. Cas. 1917B, 455; O'Gorman & Young v. Hartford F. Ins. Co. 282 U. S. 251, 257, 258, 75 L. Ed. 324, 327, 328, 72 A. L. R. 1163, 51 S. Ct. 130.
>
> "What the local conditions are in Mississippi and its neighboring states with respect to businesses like the present, carried on across state lines by individuals and corporations, does not appear. How the statutory

provisions now in question are related to others by which a permissible divergence in state policy with respect to the taxation of corporations and of individuals may be effected, is not shown. See General American Tank Car Corp. v. Day, 270 U. S. 367, 373, 70 L. Ed. 635, 638, 46 S. Ct. 234; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 251, 72 L. Ed. 551, 554, 48 S. Ct. 230; Farmers' & M. Sav. Bank v. Minnesota, 232 U. S. 516, 529, et seq., 58 L. Ed. 706, 712 34 S. Ct. 354. We cannot say that investigation in these fields would not disclose a basis for the legislation which would lead reasonable men to conclude that there is just ground for the difference here made. The existence, unchallenged, or differences between the taxation of incomes of individuals and of corporations in every federal revenue act since the adoption of the 16th Amendment, demonstrates that there may be.

"Apart from other considerations which may have led to the present legislation as an integral part of the state system of taxation of the income of corporations, one which affords a rational basis for the distinction made, is the fact that the state has adopted generally a policy of avoiding double taxation of the same economic interest in corporate income, by taxing either the income of the corporation or the dividends of its stockholders, but not both. See Secs. 5033 (a), 5033 (b) (11), 5033 (b) (8). In the case of corporate income and dividends attributable to business done outside the state and received by stockholders of domestic corporations, the stockholders are taxed, and not the corporation. That was held in Franklin v. Carter (C. C. A. 10th) 51 F. (2d) 345, to be a sufficient ground for upholding a staute of Oklahoma, assailed as denying the equal protection of the laws, which had

substantially the same features as the present statute. See also Conner v. State, 82 N. H. 126, 132, 130 Atl. 357. The question presented thus differs from any raised in Quaker City Cab. Co. v. Pennsylvania, 277 U. S. 389, 72 L. Ed. 927, 48 S. Ct. 553, and F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 64 L. Ed. 989, 40 S Ct. 560. Compare White River Lumber Co. v. Arkansas, 279 U. S. 692, 73 L. Ed. 903, 49 S. Ct. 457.

"The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions. Ohio Oil Co. v. Conway, 281 U. S. 146, 159, 74 L. Ed. 775, 781, 50 S. Ct. 310; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121, 54 L. Ed. 688, 692, 30 S. Ct. 496; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 573, 54 L. Ed. 883, 887, 30 S. Ct. 578; State Tax Comrs. v. Jackson, 283 U. S. 527, 537, 75 L. Ed. 1248, 1255, 73 A. L. R. 1464, 51 S. Ct. 540.

Affirmed."

CONCLUSION.

In conclusion we respectfully submit that the enactment of Chapter 15,624 was clearly within the legislative power and discretion; that the classifications made and the taxes imposed are not arbitrary or capricious, but rest upon reasonable bases of distinction and differences and do not unlawfully discriminate against appellants in derogation of Sections 1, 4 or 12 of the Declaration of Rights of the Florida Constitution, or of the "due process" or "equal protection of the laws" clauses contained in the Fourteenth Amendment to the Federal Constitution.

We respectfully urge, therefore, that the decision and judgment of the Supreme Court of Florida, here appealed from, should be affirmed.

CARY D. LANDIS,
Attorney-General.

H. E. CARTER,
Assistant Attorney General.

Counsel for Appellees.

State of Florida

Occupational License Tax on Stores

CHAPTER 15624

AN ACT Requiring Licenses for the Operation, Maintenance, Opening or Establishment of Stores in this State; Prescribing the License and Fees to be Paid Therefor, and the Disposition Thereof, and the Powers and Duties of the Comptroller of the State of Florida and the Tax Collectors of the Several Counties of the State in Connection Therewith, and Prescribing Penalties for the Violation Thereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That from and after the first day of October A. D. 1931, it shall be unlawful for any person, firm, corporation, association or co-partnership, whether foreign or domestic, to operate, maintain, open or establish any store in this State without first having obtained a license so to do from the Comptroller of the State of Florida or the Tax Collector of the county in which the same is located as hereinafter provided.

Section 2. Any person, firm, corporation, association or co-partnership desiring to operate, maintain, open or establish a store in this State shall, if the store or stores be all operated within the same county, apply to the Tax Collector of such county, or if more than one store is to be operated and all such stores are not located in the same county, then to the Comptroller of the State of Florida, for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the Comptroller of the State of Florida and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license; the name of such store, the location, including the street number of such store, and the full actual value of the stock of goods, wares, merchandise and commodities from which sales are to be made, including all goods, wares, merchandise and commodities owned by the applicant and held in storage to be sold in or through such store, and such other facts as the Comptroller may require. Such application shall be under oath. If the applicant desires to operate, maintain, open or establish more than one such store, all

such stores for which the applicant desires to secure licenses may be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by a license fee as prescribed in Section 5 of this Act.

Section 3. As soon as practicable after the receipt of such application, the Tax Collector or the Comptroller, as the case may be, shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination, the Tax Collector or Comptroller, as the case may be, shall find that any such application is not in proper form, and does not contain the necessary and requisite information, he shall return such application for correction. If the application is found to be satisfactory and if the filing and license fee as herein prescribed shall have been paid, the Tax Collector or Comptroller, as the case may be, shall deliver to the applicant a license for each store for which an application for a license shall have been made. Each licensee shall display the license so issued in a conspicuous place in the store for which such license is issued.

Section 4. All licenses shall be issued so as to expire on the 30th day of September of each calendar year. On or before the first day of October of each year, every person, firm, corporation, association or co-partnership having a license shall apply to the County Tax Collector or Comptroller of the State of Florida as the case may be, for a new license for the twelve calendar months next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the Comptroller of the State of Florida. No license shall lapse prior to the 31st day of October of the year next following the year in which such license was issued, and if by such 31st day of October an application for renewal license has not been filed, the Tax Collector or Comptroller, as the case may be, shall notify such delinquent license holder thereof by registered mail, and if application is not made for a renewal license on or before the 10th day of November, next ensuing, the Tax Collector or Comptroller, as the case may be, must collect, in addition to the license fee hereinafter provided, twenty-five per cent of the license tax provided in this Act before issuing the license. The continuation of the business after the expiration of the time limited in the previous license shall constitute a binding agree-

ment on the licensee to pay such penalty. Each such application for renewal license shall be accompanied by filing fee of fifty cents and by the license fee as prescribed in Section 5 of this Act.

Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act.

The license fees herein prescribed shall be as follows:

"(1) Upon one store, the annual license fee shall be Five Dollars for each such store.

(2) Upon two stores or more, but not exceeding fifteen stores, where the same are located in any one county, the annual license fee shall be Ten Dollars for each such additional store.

(3) Upon two stores or more, but not to exceed fifteen stores, where the same are located in different counties, the annual license fee shall be Fifteen Dollars for each such additional store.

(4) Upon each store in excess of fifteen, but not to exceed thirty, when all are located in any one county, the annual license fee shall be Fifteen Dollars for each such additional store.

(5) Upon each store in excess of fifteen, but not to exceed thirty, where the same are located in different counties, the annual license fee shall be Twenty Dollars for each such additional store.

(6) Upon each store in excess of thirty, but not to exceed fifty, where all are located in any one county, the annual license fee shall be Twenty Dollars for each such additional store.

(7) Upon each store in excess of thirty, but not to exceed

fifty, where the same are located in different counties, the annual license fee shall be Thirty Dollars for each such additional store.

(8) Upon each store in excess of fifty, but not to exceed seventy-five stores, where all are located in any one county, the annual license fee shall be Thirty Dollars for each such additional store.

(9) Upon each store in excess of fifty, but not to exceed seventy-five, where the same are located in different counties, the annual license fee shall be Forty Dollars for each such additional store.

(10) Upon each store in excess of seventy-five, where all are located in any one county, the annual license fee shall be Forty Dollars for each such additional store.

(11) Upon each store in excess of seventy-five, where the same are located in different counties, the annual license fee shall be Fifty Dollars for each such additional store.

In addition to the above amounts, Three Dollars for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store."

Section 6. Each and every license issued prior to the first day of April of any year shall be charged for at the full rate, and each and every license issued on or after the first day of April of any year shall be charged for at one-half of the full rate as prescribed in Section 5 of this Act.

Section 7. The provisions of this Act shall be construed to apply to every person, firm, corporation, co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimatley controlled or directed by one management or association of ultimate management.

Section 8. The term "store" as used in this Act shall be construed to mean and include any store or stores of any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. Provided, however, the term "store" shall

not include filling stations engaged exclusively in the sale of gasoline and other petroleum products.

Section 9. Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Twenty-five Dollars nor more than One Hundred Dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

Section 10. Any Tax Collector knowingly issuing a license to any person when false statements have been made in the application for such license without requiring the correction of such false statement and issuing the license in accordance with the corrected application, and any Tax Collector who knows of any person liable for license tax imposed by this Act or who transacts business without such license in violation of this Act, without giving written notice of such facts to the prosecuting officer whose duty it would be to prosecute such offender, and any prosecuting officer whose duty it would be to prosecute any person for the violation of this Act, after having received written notice from the Tax Collector of the failure of such person to procure a license, (unless the investigation of such prosecuting officer shall disclose that such person was not liable for such tax), shall be subject to removal from office, and it shall be the duty of the Governor to remove him from office.

Section 11. A County license tax of twenty-five per cent of the State license tax shall be levied and imposed upon each store as herein defined and each incorporated municipality of the State of Florida is authorized to levy a municipal license tax of twenty-five per cent of the State tax imposed by this Act, provided that the tax levied by or for the several counties and municipalities shall be graduated only on the number of stores situate in such county or municipality, respectively, notwithstanding the applicant may own other stores beyond the limits of such county or municipality, as the case may be. In all cases coming within this Section of this Act, where the license must be obtained from the Comptroller of the State of Florida, the county and municipal taxes shall be paid by the applicant to the Comptroller and im-

mediately remitted to the proper officers of the several counties and municipalities of the State.

Section 12. All licenses provided for in this Act shall be issued by the County Judges of the several counties of the State of Florida and turned over to the Tax Collector of their respective counties and the Comptroller of the State of Florida, to be issued and delivered to the licensees upon the payment of the license tax herein provided; provided, however, that before any such license shall be issued and delivered by the Comptroller, or any Tax Collector in the State of Florida, the same shall be countersigned by the Comptroller or Tax Collector, as the case may be.

Section 13. The County Judge of each county shall be entitled to a fee of Twenty-five Cents for each license issued by him, which shall be paid out of the filing fee herein provided for.

Section 14. All laws and parts of laws in conflict herewith are hereby repealed. This Act shall take precedence over any other Act passed by the Legislature of the State of Florida, at the session of 1931, which may appear to be in conflict herewith, and shall be in full force and effect notwithstanding any provisions of any other Act or part of Act.

Section 15. If any section, provision or clause of this Act shall be declared invalid or unconstitutional, or if this Act as applied to any circumstances shall be declared invalid or unconstitutional, such invalidity shall not be construed to affect the portions of this Act not so held to be invalid or the application of this Act to other circumstances not so held to be invalid.

Section 16. This Act shall take effect immediately upon its becoming a law.

Became a law without the Governor's approval on July 3, 1931.

CORRECTED COPY pp. 8, 13, 17, 18, 22, 26, 29, 21, 22, 26, of dissent.

SUPREME COURT OF THE UNITED STATES.

No. 301.—October Term, 1932.

Louis K. Liggett Company, et al., Appellants, *vs.* J. M. Lee, as Comptroller of the State of Florida, et al. } Appeal from the Supreme Court of the State of Florida.

[March 13, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

Chapter 15624 of the laws of Florida, 1931, declares it unlawful for any person, firm, corporation, association, or copartnership, foreign or domestic, to operate any store within the State without first having obtained a license, designates the officer to whom application shall be made, regulates the procedure for issuance of licenses, and provides for annual renewal. The act requires the payment of a filing fee, and by section 5, which is copied in the margin,* fixes the amount of the license fee. A tax

*"Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act.

"'The license fees herein prescribed shall be as follows:

"'(1) Upon one store, the annual license fee shall be Five Dollars for each such store.

"'(2) Upon two stores or more, but not exceeding fifteen stores, where the same are located in any one county, the annual license fee shall be Ten Dollars for each such additional store.

"'(3) Upon two stores or more, but not to exceed fifteen stores, where the same are located in different counties, the annual license fee shall be Fifteen Dollars for each such additional store.

"'(4) Upon each store in excess of fifteen, but not to exceed thirty, when all are located in any one county, the annual license fee shall be Fifteen Dollars for each such additional store.

greater than that exacted for a single store is fixed for each store in excess of one, but not exceeding fifteen, owned or operated by the same person or corporation. The fee for each store is stepped up in amount as the number constituting the chain reaches certain specified limits. This graduated scale applies to stores all of which are within a single county; but if the same number of stores is located in more than one county the license fee for each is materially increased.

The act imposes the tax only on retail stores and excludes from the definition of a store filling stations engaged exclusively in the sale of gasoline and other petroleum products. It provides for a separate county license tax equal to twenty-five per cent. of the state license fee, and authorizes a municipal tax of the same amount, measuring the graduated tax in the case of counties and municipalities by the number of stores situate in the county or municipality, notwithstanding the applicant may own other stores beyond the limits of the governmental subdivision.

In addition to the described license taxes the act imposes a levy of $3.00 for each $1,000 of value of stock carried in each store, or for sale in such store, and this is defined to include merchandise

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"'(5) Upon each store in excess of fifteen, but not to exceed thirty, where the same are located in different counties, the annual license fee shall be Twenty Dollars for each such additional store.

"'(6) Upon each store in excess of thirty, but not to exceed fifty, where all are located in any one county, the annual license fee shall be Twenty Dollars for each such additional store.

"'(7) Upon each store in excess of thirty, but not to exceed fifty, where the same are located in different counties, the annual license fee shall be Thirty Dollars for each such additional store.

"'(8) Upon each store in excess of fifty, but not to exceed seventy-five stores, where all are located in any one county, the annual license fee shall be Thirty Dollars for each such additional store.

"'(9) Upon each store in excess of fifty, but not to exceed seventy-five, where the same are located in different counties, the annual license fee shall be Forty Dollars for each such additional store.

"'(10) Upon each store in excess of seventy-five, where all are located in any one county, the annual license fee shall be Forty Dollars for each such additional store.

"'(11) Upon each store in excess of seventy-five, where the same are located in different counties, the annual license fee shall be Fifty Dollars for each such additional store.

"'In addition to the above amounts, Three Dollars for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store.'"

owned by the taxpayer and held in storage to be sold in or through such store.

Three chain store owners filed in the Circuit Court of Leon County, Florida, a class bill, in which twelve others intervened and became co-plaintiffs, praying that the tax officials be enjoined from enforcing the act. The complainants are corporations of Florida and other states. They challenge the statute as violative of various provisions of the constitution of Florida, of the due process and equal protection clauses of the Fourteenth Amendment, and of the Commerce Clause of the federal constitution. The bill sets forth in great detail facts claimed to assimilate the operation of chain stores to that of stores individually owned and operated in the state of Florida. So called voluntary chains of retail stores are described at length and their methods of operation compared with those of chain stores, the purpose being to demonstrate that there is no essential difference between the two methods of conducting business. On the basis of the facts recited the bill charges that to tax a store operated in the one manner and exempt an establishment conducted in the other is arbitrary and unreasonable. The difference in the amount of tax laid upon the operator of a given number of stores in a single county and another conducting the same number in two or more counties is challenged as an unconstitutional discrimination. The imposition of a tax of $3.00 per $1,000 on retail merchants not only as respects the stock actually contained in their stores, but also on goods in warehouse intended for sale in such stores, is attacked as discriminatory, for the reason that under another statute wholesale merchants are taxed only $1.50 per $1,000 of merchandise carried in their stores or warehouses. The exemption of filling stations is alleged to discriminate against the appellants in violation of the Fourteenth Amendment. The bill further avers that certain of the plaintiffs receive their goods from warehouses maintained outside the state of Florida, or order shipments to their stores from wholesale houses situate without the State, whereas many operators of single stores who are members of voluntary chains obtain their supplies from wholesalers in Florida, or from a warehouse in the State conducted by a voluntary chain corporation. The unequal effect of the act on these transactions is charged to be an unconstitutional burden upon interstate commerce.

The defendants moved to dismiss. The cause was heard upon this motion and a decree entered dismissing the bill at complainants' costs. The Supreme Court of Florida affirmed the decree. The present appeal presents only the questions arising under the federal constitution.

1. In support of the allegation of arbitrary and unreasonable discrimination the bill recites facts from which appellants claim the conclusion is inevitable that there is no difference between the method of conducting chain stores and those employed in department stores, so called voluntary chains, and singly operated units. This is but a reiteration of the contention made and overruled in *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527. It was there held that whatever may be said of individual similarities and differences between chain store operation and the conduct of a single shop or a department store, the former employ distinguishable methods of conducting business, and the legislature may make the difference in method and character of the business the basis of classification for taxation. In their bill the complainants aver that the fact situation in Florida at the date of suit differed materially from that set forth in the *Jackson* case. Each of the features of chain store operation enumerated in this court's opinion is singled out, and as respects each the averment is that as to some chain store operators, or some operators of individual stores, the present case differs from the *Jackson* case.

In their endeavor thus to distinguish the earlier case, the appellants stress mere details, but ignore the underlying reason for sustaining the classification there attacked. The decision in the *Jackson* case was based not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental. While incidents of the operation of the one may be quite similar to those found in the other, there is a clear distinction between one owner operating many stores and many owners each operating his own store with a greater or less measure of cooperation voluntarily undertaken. The legislature may make the distinction the occasion of classification for purposes of taxation.

Neither similarity of opportunities and advantages in some aspects, nor the fact that the one kind of store competes with the other, is enough to condemn the discrimination in the taxes imposed. It is needless to repeat what was said in the *Jackson* case to the effect that the difference between the subjects taxed need not be great, and that if any reasonable distinction can be found the duty of the court is to sustain the classification embodied in the law.

2. The statute lays a tax of a stated sum per store on any given number of stores in the same ownership located within the same county; but if one happens to be in a county other than that in which the remainder are situate, imposes an increased tax not only on the single one lying in the second county, but on all. Thus if an owner has fourteen stores he may add a fifteenth in the same county and the only additional tax will be in the amount of $10 attributable to the privilege of conducting the new store. But if the new store happens to be in another county the license fee for it will be increased to $15, and that for each of the other fourteen, which have long since been opened and operated in the original county, will be increased from $10 to $15.

We are unable to discover any reasonable basis for this classification. As we have held, gradation of the tax according to the number of units operated cannot be said to be so unreasonable as to transcend the constitutional powers of the legislature. The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chain cannot be condemned as arbitrary; but an increase in the levy not only on a new store but on all the old stores, consequent upon the mere physical fact that the new one lies a few feet over a county line, finds no foundation in reason or in any fact of business experience. There is no more reason for adopting the county line as the measure of the tax than there would be for taking ward lines in cities, or arbitrary lines drawn through the state regardless of county boundaries. It is suggested that the license fee for extending operations into a great and populous city, or for doing business upon crowded business streets, should be greater than for the same privilege in a village or a sparsely settled suburb. But the adoption of a county line can have no reference either to density of population, congregation of the buying public, or any other factor bearing upon the choice of a business site.

The appellees suggest that an owner reaps greater advantage by the establishment of a new store in a county not previously occupied. This may be conceded. It is evident, however, that the mere spatial relation between the store and a county line, cannot, in and of itself, affect the value of the privilege enjoyed. The appellees fail to show how the fact that the new place of business lies in another county increases the advantage over that to accrue from a location within the same county. The classification is solely of different chains, and the difference between them consists neither in number, size, surrounding population, nor in any factor having a conceivable relation to the privilege enjoyed.

It cannot justifiably be said that the section draws a distinction between national and local chains. The operation of the statute forbids any such assumption; for if a national chain keeps multiple units within a single county the tax on each is at the lower rate, while if a so-called local chain has one store in a given county and another just over the county line both places of business take the higher rate. This difference in treatment has no discernible relation to the sort of chain which establishes a store across a county line. The Act is not a rough and ready but honest effort to differentiate what the Federal Census Bureau for its purposes denominates local chains on the one hand and what the Bureau terms sectional or national chains on the other. Neither the phraseology nor the method of operation of the Act is consistent with an attempt at any such classification.

The suggestion is made that the statute is in reality aimed solely at large corporate chains; and that as none other are parties to this suit, we may ignore any discriminatory features as respects individual owners of multiple units. But this is to construe the act by pure speculation and not by what it says, nor by any declared purpose, nor by anything contained in the record. Conceding for the purpose of the argument that in levying the tax the legislature might have drawn a distinction between corporate owners and individuals, and again between small owners, whether corporate or individual, and large owners, we are not permitted to guess at any such undisclosed purpose in the minds of those who adopted the statute. Assuming power to suppress by taxation a form of organization deemed inimical to the public interest, we can attribute no such motive to the present statute in the absence of legislative declaration or record proof. The Act taxes owner-

ship and operation of stores, not corporate nor large corporate operation. The exaction is based on the doing of a business, not on the personality of the merchant.

The title declares it "An act requiring licenses for the operation, maintenance, opening or establishment of stores in the state" . . . Section 1 enacts "That from and after the first day of October, A. D. 1931, it shall be unlawful for any person, firm, corporation, association or copartnership, whether foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license" . . .

It would violate every principle of statutory construction to hold that this plain language really means that individuals and small local corporations are not within the intendment of the Act, but that it in fact applies only to so-called giant corporations. To attribute such a covert, hidden, and indirect purpose to those who passed the statute is, in effect, to charge the lawmakers with saying one thing and meaning another. Nothing said in *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 440, or any other decision of this court, justifies such a pronouncement. The legislature of Florida has declared the purpose and object of the statute to be to tax every store owner and operator, and we should not go behind that declaration and attribute to the lawmakers some other ulterior design. Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Kentucky Co.* v. *Paramount Exchange*, 262 U. S. 544; *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490; *Liggett Co.* v. *Baldridge*, 278 U. S. 105; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239. Unequal treatment and arbitrary discrimination as between corporations and natural persons, or between different corporations, inconsistent with the declared object of the legislation, cannot be justified by the assumption that a different classification for a wholly different purpose might be valid.

Those provisions of Section 5 which increase the tax if the owner's stores are located in more than one county are unreasonable and arbitrary, and violate the guaranties of the Fourteenth Amendment.

3. Section 11 of the act provides:

"A County license tax of twenty-five per cent of the State license tax shall be levied and imposed upon each store as herein defined

and each incorporated municipality of the State of Florida is authorized to levy a municipal license tax of twenty-five per cent of the State tax imposed by this Act, provided that the tax levied by or for the several counties and municipalities shall be graduated only on the number of stores situate in such county or municipality, respectively, notwithstanding the applicant may own other stores beyond the limits of such county or municipality, as the case may be". . . .

The attack upon this section is the same as that leveled against Section 5, which ordains the license tax for state purposes. If, as we have held, it is permissible for the state for its own purposes to impose a tax on a graduated scale depending upon the number of units operated by the chain, it is equally so for a municipality to grade its taxation by the same method, when duly authorized by state authority.

4. Section 5, in addition to the graduated license fee, lays a tax of $3.00 on each $1,000 value of stock carried in each store, or for sale in such store, and Section 2 includes within the goods, wares and merchandise from which sales are to be made those owned by the taxpayer and held in storage to be sold in or through such store. The appellants insist that this requirement deprives them of the equal protection of the law for the reason that wholesale merchants not taxed by the act in question are assessed under § 926 of the Revised General Statutes of Florida a tax of only $1.50 per $1,000 of value on stock carried in their stores or warehouses. The result is said to be that a chain store operator must pay double the amount paid by the wholesaler who supplies individual stores competing with the chain.

Chain stores do not sell at wholesale. What they store, if they warehouse any goods in the state of Florida, is for the purpose of retail sale at their shops. On the other hand, goods held by a wholesaler are stored for sale to retail establishments to be resold by the latter. What has been said with respect to difference in methods and operation of the two kinds of warehouses applies in this instance. The diverse purposes of the storage and the difference in the nature of the business conducted are sufficient to justify a different classification of the two sorts of warehouses for taxation.

5. Section 8, which defines a store, contains a proviso to the effect that the term shall not include "filling stations engaged exclusively in the sale of gasoline or other petroleum products".

The appellants assert the exemption deprives them of equal protection, since it is arbitrary and unreasonable. It appears, however, that all dealers in gasoline, including those conducting filling stations, are required by statute to pay a license tax of $5 per annum and in addition a tax of seven cents per gallon for every gallon of gasoline or other like products of petroleum sold (chaps. 15659 and 15788, Laws of Florida, Acts of 1931). It has long been settled that the Fourteenth Amendment does not prevent a state from imposing a tax upon different trades and professions or varying the rates of excise upon various products. *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121-122. Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, may be obnoxious to the Constitution, but in view of the imposition of taxes on the operation of filling stations by other acts, pursuant to the legislature's power of classification, we cannot declare their exemption from the tax laid by the chain store act offensive to the guaranties of the Fourteenth Amendment.

6. It is asserted that the act bears unevenly upon those who purchase directly from a wholesale house or manufacturer whose plant is outside the State, some of whom also store the goods in Florida preparatory to retail sale, and those who purchase from a wholesaler within the State; that the former are engaged in interstate commerce, and the tax is as to them a burden upon that commerce. The claim merits no serious discussion. The tax is obviously laid for the privilege of operating stores in Florida, and attempts no discrimination between merchandise imported from another state and that produced in Florida. Compare *Emert* v. *Missouri*, 156 U. S. 296; *Armour & Co.* v. *Virginia*, 246 U. S. 1; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506. It levies no tax and lays no burden on the purchase in interstate commerce of articles for sale in Florida. *Kehrer* v. *Stewart*, 197 U. S. 60, 65; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 471. The tax on the value of merchandise in a retail store, or warehoused in Florida for sale in that store, even though incident on articles which have moved in interstate commerce, is laid after interstate commerce has ceased. Compare *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *Bacon* v. *Illinois*, 227 U. S. 504; *Texas Co.* v. *Brown*, 258 U. S. 466, 475; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 478.

7. The bill avers that the State officials charged with the administration of the act have failed to demand the tax and do not intend to collect it from the owners of stores in certain lines of business, such as furniture dealers. This alleged official dereliction is claimed to be an unconstitutional discrimination in the enforcement of the act. For this proposition appellants rely upon decisions such as *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, and *Iowa-DesMoines Nat. Bank* v. *Bennett*, 284 U. S. 239, holding a failure to assess all property taxed *ad valorem* at the same proportion of its value to be a denial of equal protection. The principle upon which those cases rest is that where a statute lays a tax upon property *ad valorem* at an even and equal rate, discrimination may result from the fact that the assessing officials systematically and intentionally value some property subject to the tax at a proportion of its true value different from that fixed with respect to other like property. They do not support the appellants' contention that where the taxing officials fail and neglect to exact the tax from some persons alleged to owe it, all others who are subject to the levy are in virtue of such omission exempt. This court has said that in the case of unequal and discriminatory assessment, to hold that the complaining taxpayer's only remedy is to have the assessments on all the other property raised to a level equal with that of his own is in effect to deny any remedy whatever. As a consequence redress is afforded by requiring the assessing body to revise the complainant's assessment to the level of those upon other like property. Appellants insist that by analogy they are entitled to be exempt, if others are improperly relieved from taxation.

Under the law of Florida every unit of the taxpaying public has an interest in having all property subject to taxation legally assessed, and may in behalf of himself and others in like situation require that all property subject to taxation be placed on the tax books and bear its proportionate part of the expense of government. The appellants, if they deem the tax illegally omitted in certain cases, may apply for a writ of mandamus to compel the taxing officials to do their duty. *State ex rel. Dofnos Corp.* v. *Lehman et al.*, 100 Fla. 1401. Failure to collect the tax from some whose occupations fall within the provisions of the act, cannot excuse the appellants from paying what they owe. And certainly the remedy afforded by state law assures them equal treatment along with all others similarly situated.

8. We are told that the legislature of Florida would not have passed the act if any of its provisions were for any reason to be inoperative, and we are asked, therefore, to declare the entire statute void.

Section 15 provides:

"If any section, provision or clause of this Act shall be declared invalid or unconstitutional, or if this Act as applied to any circumstances shall be declared invalid or unconstitutional, such invalidity shall not be construed to affect the portions of this Act not so held to be invalid or the application of this Act to other circumstances not so held to be invalid."

The operation of this section consequent on our decision is a matter of state law. While we have jurisdiction of the issue, we deem it appropriate that we should leave the determination of the question to the State court. See *King* v. *West Virginia,* 216 U. S. 92; *Schneider Granite Co.* v. *Gast Realty Co.,* 245 U. S. 288, 290; *Dorchy* v. *Kansas,* 264 U. S. 286, 291.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 301.—October Term, 1932.

Louis K. Liggett Company, et al., Appellants, *vs.* J. M. Lee, as Comptroller of the State of Florida, et al.	Appeal from the Supreme Court of the State of Florida.

[March 13, 1933.]

Mr. Justice Brandeis dissenting in part.

In my opinion, the judgment of the Supreme Court of Florida should be affirmed.

Florida Laws, 1931, Chapter 15,624 is legislation of the type popularly called Anti-Chain Store Laws. The statute provides for the licensing of retail stores by the State, the counties and the municipalities—a system under which large revenues may be raised. But the raising of revenue is obviously not the main purpose of the legislation. Its chief aim is to protect the individual, independently-owned, retail stores from the competition of chain stores. The statute seeks to do this, by subjecting the latter to financial handicaps which may conceivably compel their withdrawal from the State. An injunction against its enforcement is sought on the ground that the law violates rights guaranteed by the Federal Constitution.

The Florida law is general in its terms. It prohibits the operation, after September 30, 1931, of any retail store without securing annually a license; and provides, among other things, for annual fees which are in part graduated. If the owner operates only one store the state fee is $5; if more than one, the fee for the additional stores rises by step increases, dependent upon both the number operated and whether all operated are located in a single county. The highest fee is for a store in excess of 75. If all of the stores are located in a single county, the fee for each store in excess of 75 is $40; if all are not located in the same county the fee is $50. Under this law, the owner of 100 stores not located in a single county pays for each store operated, on the

average, $33.65; and if they were located in a single county the owner would pay for each store, on the average, $25.20. If the 100 stores were independently owned (although operated cooperatively as a so-called "voluntary chain") the annual fee for each would be only $5. The statute provides that the licenses shall issue to expire on September 30th of each calender year. This suit was begun September 30th, 1931. The first license year had expired before the case was heard in this Court.

In its main features, this statute resembles the Indiana law discussed in *Tax Commissioners* v. *Jackson*, 283 U. S. 527. For the reasons there stated, the Court sustains like provisions in the Florida statute. But it declares arbitrary, and hence invalid, the novel provision imposing heavier license fees where the multiple stores of a single owner are located in more than one county, because it is "unable to discover any reasonable basis for this classification." There is nothing in the record to show affirmatively that the provision may not be a reasonable one in view of conditions prevailing in Florida. Since the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute, its validity should, in my opinion, be sustained. *O'Gorman & Young, Inc.* v. *Hartford Insurance Co.*, 282 U. S. 251, 257-8; *Railway Express Agency* v. *Virginia*, 282 U. S. 440, 444; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, 158; *Boston & Maine R. Co.* v. *Armbury*, 285 U. S. 234, 240; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 283.

There is, however, another ground on which this provision should be, and the whole statute could be, sustained—a ground not considered in the *Jackson* case and not pertinent there. Jackson was an individual. The plaintiffs here are all corporations. Though the provisions of the statutes in the two States are similar, certain rules of law applicable to the parties to the litigation are different.

The plaintiffs are thirteen corporations which engage in Florida exclusively in intrastate commerce. Each (except one) owns and operates a chain of retail stores within the State and some operate stores in more than one county. Several of the plaintiffs are organized under the laws of Florida; the rest under the laws of other States. No claim of discrimination as between the foreign and domestic corporations is made, compare *Southern Ry. Co.* v.

Greene, 216 U. S. 400; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494; nor could it be, since the statute affects both classes of corporations alike. The suit is brought as a class suit, for the benefit of all merchants similarly situated who may desire to avail themselves thereof. From certain allegations in the bill it may be inferred that there are at least two natural persons within the State who own and operate more than one store. But as no such person has intervened in the cause, we have no occasion to enquire whether the discrimination complained of would be fatal as applied to natural persons. The plaintiffs can succeed only if the discrimination is unconstitutional as applied to them; that is, as applied to corporations. One who would strike down a statute must show not only that he is affected by it, but that as applied to him it exceeds the power of the State. This rule, acted upon as early as *Austin* v. *The Aldermen*, 7 Wall. 694, and definitely stated in *Supervisor* v. *Stanley*, 105 U. S. 305, 314, has been consistently followed since that time. Compare *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, 54-55; *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative*, 276 U. S. 71, 88. For the reasons to be stated, the discrimination complained of, and held arbitrary by the court is, in my opinion, valid as applied to corporations.

First. The Federal Constitution does not confer upon either domestic or foreign corporations the right to engage in intrastate commerce in Florida. The privilege of engaging in such commerce in corporate form is one which the State may confer or may withhold as it sees fit. Compare *Railway Express Agency* v. *Virginia*, 282 U. S. 440. See *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 184-5, 186; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 314; *Hemphill* v. *Orloff*, 277 U. S. 537, 548. Florida might grant the privilege to one set of persons and deny it to others; might grant it for some kinds of business and deny it for others; might grant the privilege to corporations with a small capital while denying it for those whose capital or resources are large. Or, it might grant the privilege to private corporations whose shares are owned mainly by those who manage them and to corporations engaged in cooperative undertakings, while denying the privilege to other concerns called private, but whose shares are listed on a stock exchange—corporations financed

by the public, largely through the aid of investment bankers. It may grant the privilege broadly, or restrict its exercise to a single county, city or town, and to a single place of business within any such subdivision of the State.

Whether the corporate privilege shall be granted or withheld is always a matter of state policy. If granted, the privilege is conferred in order to achieve an end which the State deems desirable. It may be granted as a means of raising revenue; or in order to procure for the community a public utility, a bank or a desired industry not otherwise obtainable; or the reason for granting it may be to promote more generally the public welfare by providing an instrumentality of business which will facilitate the establishment and conduct of new and large enterprises deemed of public benefit. Similarly, if the privilege is denied, it is denied because incidents of like corporate enterprise are deemed inimical to the public welfare and it is desired to protect the community from apprehended harm.

Here we are dealing only with intrastate commerce. Compare *Carley & Hamilton, Inc.* v. *Snook*, 281 U. S. 66, 71. Since a State may fix the price for the privilege of doing intrastate commerce in corporate form, and the corporation is free to accept or reject the offer, the State may make the price higher for the privilege of locating stores in two counties than in one. Can it be doubted that a State, being free to permit or to prohibit branch banking, would be at liberty to exact a higher license fee from banks with branches than from those with only a single place of business; that it might exact a higher fee from those banks which have branches in several counties than it does from those whose branches are all within a single county; and that it might do so without obligation to justify, before some court, the reasonableness of the difference in the license fees?[1] The difference made by Florida in exacting a higher license

[1]In only 9 states is state-wide branch banking permitted: Arizona, California, Delaware, Maryland, North Carolina, Rhode Island, South Carolina, Vermont, and Virginia. Of these, all except South Carolina and Maryland require the authorization of the appropriate state officer. See Federal Reserve Bulletin, April, 1930, pp. 258-266; *id.*, July, 1932, pp. 455-458. Congress prohibited the establishment of any branch national bank from 1863 to 1927; see First National Bank *v.* Missouri, 263 U. S. 640, 656-659. The law of that year authorized branches only within the same city; and only if the state laws so permitted. Act of February 25, 1927, 44 Stat. 1224, 1228, c. 191, § 7. Compare Act of February 25, 1933, — Stat. —.

fee for those concerns which do business in more than one county is similar in character to that suggested.

If the Florida statute had stated in terms that the license fee was exacted as compensation for the privilege of conducting multiple stores in corporate form, it seems clear that no corporation could successfully challenge its validity. Compare *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Kansas City Ry. Co.* v. *Kansas*, 240 U. S. 227; *Nebraska ex rel. Beatrice Creamery Co.* v. *Marsh*, 282 U. S. 799. And since the State had the power so to do, the mere failure to state that such was the nature of the exaction does not render it invalid. Compare *Castillo* v. *McConnico*, 168 U. S. 674, 683. Nor does the fact that the plaintiffs had been admitted to the State prior to enactment of the statute. A State which freely granted the corporate privilege for intrastate commerce may change its policy. It may conclude, in the light of experience, that the grant of the privilege for intrastate commerce is harmful to the community and may decide not to grant the privilege in the future. It may go further in the process of exclusion. It may revoke privileges theretofore granted, compare *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 343; *Crescent Oil Co.* v. *Mississippi*, 257 U. S. 129, since, in the absence of contract, there is no vested interest which requires the continuance of a legislative policy however expressed—whether embodied in a charter or in a system of taxation. *Citizens' Savings Bank* v. *Owensboro*, 172 U. S. 636, 644; *Texas & N. O. R. R. Co.* v. *Miller*, 221 U. S. 408, 414-415; *Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 701; *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147, 157. Compare *Louisville Bridge Co.* v. *United States*, 242 U. S. 409.

If a State believes that adequate protection against harm apprehended or experienced can be secured, without revoking the corporate privilege, by imposing thereafter upon corporations the handicap of higher, discriminatory license fees as compensation for the privilege, I know of nothing in the Fourteenth Amendment to prevent it from making the experiment. The case at bar is not like those where a restriction upon the liberty of the individual may be attacked by showing that no evil exists, or is apprehended, or that the remedy provided cannot be regarded as appropriate to its removal. Nor is the case like those where a state regulation or state taxes burden interstate commerce. Compare *Welton* v. *Missouri*, 91 U. S. 275; *Robbins* v. *Shelby County Taxing District*,

120 U. S. 489; *Caldwell* v. *North Carolina*, 187 U. S. 622, 626; *Davis* v. *Farmers Co-operative Equity Co.*, 262 U. S. 312; *Buck* v. *Kuykendall*, 267 U. S. 307. Cases like *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Looney* v. *Crane Co.*, 245 U. S. 178; *Terral* v. *Burke Construction Co.*, 257 U. S. 529, have no application to the situation here discussed.

Whether the citizens of Florida are wise in seeking to discourage the operation of chain stores is, obviously, a matter with which this Court has no concern. Nor need it, in my opinion, consider whether the differences in license fees employed to effect such discouragement are inherently reasonable, since the plaintiffs are at liberty to refuse to pay the compensation demanded for the corporate privilege and withdraw from the State, if they consider the price more than the privilege is worth. But a review of the legislation of the several States by which all restraints on corporate size and activity were removed, and a consideration of the economic and social effects of such removal, will help to an understanding of Anti-Chain Store Laws; and will show that the discriminatory license fees prescribed by Florida, even if treated merely as a form of taxation, were laid for a purpose which may be appropriately served by taxation, and that the specific means employed to favor the individual retailer are not constitutionally objectionable.

Second. The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation. Throughout the greater part of our history a different view prevailed. Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational and charitable purposes.[2] It was denied because of fear. Fear of encroachment upon the liberties and op-

[2]See Joseph S. Davis, Essays in the Earlier History of American Corporations, Vol. II, pp. 16-18, 308-309. New York permitted incorporation under a general law for some business purposes in 1811. By 1850 a general law permitting incorporation for a limited business purpose had become common; and after 1875 extension of the privilege to every lawful business became so.

portunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain.[3] There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So at first the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable. The later enactment of general incorporation laws does not signify that the apprehension of corporate domination had been overcome. The desire for business expansion created an irresistible demand for more charters; and it was believed that under general laws embodying safeguards of universal application the scandals and favoritism incident to special incorporation could be avoided. The general laws, which long embodied severe restrictions upon size and upon the scope of corporate activity, were, in part, an expression of the desire for equality of opportunity.[4]

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[3]It was doubtless because of this, that the earlier statutes limited the life of corporations to fixed terms of 20, 30 or 50 years. See the statutes cited in subsequent notes.

The power of legislatures to grant special charters was sometimes strictly limited, even before the adoption of constitutional amendments withdrawing that power entirely. Thus the New York Constitution adopted in convention in November, 1821, and by popular vote in January, 1822, required the assent of two-thirds of each house for any act "creating, continuing, altering or renewing any body politic or corporate"—Art. 7, § 9; L. 1822-24, p. x. Similar provisions were included in the Delaware Constitution of 1831, Art. 2, § 17; in the Florida Constitution of 1838, Art. 13, § 2 (with an additional requirement of three months' public notice); and in the Michigan Constitution of 1835, Art. 12, § 2. The Rhode Island Constitution of 1842, Art. 4, § 17, required a bill for a corporate charter to be continued to the next legislature. The Constitution of Illinois, adopted in 1848, provided that no act authorizing the formation of a corporation with banking powers should be effective unless ratified by popular vote—Art. X, § 5; and a similar provision was included in the Constitution of Wisconsin, 1848, Art. II, §§ 4, 5.

[4]That the desire for equality and the dread of special privilege were largely responsible for the general incorporation laws is indicated by the fact that many States included in their constitutions a prohibition of the grant of special charters. The first constitutional provision requiring incorporation under general laws seems to be that in the New York constitution of 1846—Art. 8, § 1 (except where objects of incorporation were not thus attainable). Other States followed in later years. Ala. 1867, Art. 13; Ark.

(a). Limitation upon the amount of the authorized capital of business corporations was long universal.[5] The maximum limit frequently varied with the kinds of business to be carried on, being dependent apparently upon the supposed requirements of the efficient unit. Although the statutory limits were changed from time to time this principle of limitation was long retained. Thus in New York the limit was at first $100,000 for some businesses and as little as $50,000 for others.[6] Until 1881 the maxi-

1874, Art. 12; Calif. 1849, Art. 4, § 31; Colo. 1876, Art. 15, § 2; Del. 1897, Art. 9, § 1; Ga. 1868, Art. 3, § 7; amended by Laws 1890-1891, p. 55; Idaho 1889, Art. 11, § 2; Ill. 1848, Art. 10, § 1; Ind. 1851, Art. 11, § 13; Iowa 1846, Art. 8, § 2; Kans. 1855, Art. 13, § 1; La. 1864, Art. 121; Me. 1875, Art. 4, § 14 (except where objects could not thus be attained); Md. 1851. Art. 3, § 47 (except where objects could not thus be attained); Mich. 1850, Art. 15, § 1; Minn. 1857, Art. 10, § 2; Miss. 1890, Art. 7, § 178; Mo. 1865, Art. 8, § 4; Mont. 1889, Art. 15, § 2; Neb. 1866, Tit. Corporations, § 1; Nev. 1864, Art. 8, § 1; N. J. 1875, Art. 4, § 7; N. Car. 1868, Art. 8, § 1 (except where objects could not thus be attained); N. Dak. 1889, Art. 7, § 131; Ohio 1851, Art. 13, § 1; Ore. 1857, Art. 11, § 2; Penna 1874, Art. 3, § 7; S. Dak. 1889, Art. 17, § 1; Tenn. 1870, Art. 11, § 8; Texas 1876, Art. 12, § 1; Utah 1895, Art. 12, § 1; Va. 1902, Art. 12, § 154; Wash. 1889, Art. 12, § 1; W. Va. 1872, Art. 11, § 1; Wis. 1848, Art. 11, § 1 (except where objects could not thus be attained). 6/

[5] *Alabama*—until 1876, the limit was $200,000. Rev. Code 1867 (Walker), part 2, c. 3, § 1759; Act No. 282, March 3, 1870, § 3, L. 1869-70, p. 320. Under the Code of 1876 (Wood & Roquemore), § 1811, p. 509 (Act of February 28, 1876, § 9, L. 1875-76, p. 244), the limit was $1,000,000. Under the Code of 1896 (Civil, c. 28, § 1259, p. 429), it was $10,000,000. *Arizona*—Comp. L. 1864-71, c. 51, § 19, p. 486—$5,000,000. *Illinois*—$200,000, Act of June 22, 1852, L. p. 135; $1,000,000, Act of February 17, 1857, L. p. 110; $500,000, Act of February 18 1857, L. p. 161. *Maine*—$50,000, Act of March 19, 1862, c. 152 § 3; $200,000, Act of February 28, 1867, c. 125, § 7; February 26, 1870, c. 93, § 1; $500,000, Act of February 3, 1876, c. 65, § 2; $2,000,000, Act of February 14, 1883, c. 116, § 1; $10,000,000, Act of March 25, 1891, c. 99, § 1. The Act of March 21, 1901, c. 229, was the first to prescribe no limit. *Wisconsin*—Until 1879, $250,000, Rev. Stat. 1878, c. 86, § 1772, p. 516; Act of February 7, 1879, c. 7, L. 1879, p. 10. Limits were imposed in some cases even by *Delaware* (March 21, 1871, c. 152, 14 Del. L. 299) and *New Jersey* (March 30, 1865, c. 379, L. 1865, p. 707; March 31, 1869, c. 374, L. 1869, p. 1001). And see the notes following.

[6] The Act of March 22, 1811, c. 67, limited the capital stock to $100,000. The purposes for which corporations might be formed under this law were limited to the following: manufacturing woolen, cotton or linen goods; making glass; making, from ore, bar-iron, anchors, mill-irons, steel, nail rods, hoop iron, ironmongery, sheet lead, shot, white lead and red lead. The Act

mum for business corporations in New York was $2,000,000; and until 1890, $5,000,000.[7] In Massachusetts the limit was at first $200,000 for some businesses and as little at $5,000 for others.[8] Until 1871 the maximum for mechanical and manufacturing corporations was $500,000; and until 1899, $1,000,000.[9] The limit of

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of April 14, 1817, c. 223, extended the purposes to include the manufacture of morocco and other leather; but for such objects the capital stock was not to exceed $60,000. Further limitations were added from time to time, with the general limitation of $100,000, or a lower limitation; as, for example, $50,000 for corporations manufacturing salt. L. 1821, c. 231, § 19. The Act of 1852, c. 228, provided for the incorporation of companies for ocean navigation, and limited the authorized capital to $2,000,000; this was increased to $4,000,000 by Act of 1853, c. 124; to $8,000,000 by Act of 1866, c. 322; to $20,000,000 by Act of 1867, c. 419; and this was decreased to $4,000,000 by Act of 1875, c. 445. The Act of 1853, c. 117, provided for the incorporation of building companies, and set a maximum of $500,000; this was increased to $1,000,000 by Act of 1870, c. 773. The Act of 1854, c. 232, provided for the incorporation of companies to navigate lakes and rivers, and set a maximum of $1,000,000; this was increased to $2,000,000 by Act of 1865, c. 691. The Act of 1874, c. 143, provided for the incorporation of hotel companies, and set a maximum of $1,000,000.

[7]The General Business Corporation Act of 1875, c. 611, § 11, set a maximum of $2,000,000. This was increased to $5,000,000 by Act of 1881, c. 295.

[8]The first general act, May 15, 1851, c. 133, permitted incorporation for "any kind of manufacturing, mechanical, mining or quarrying business." It limited the maximum to $200,000 Act of March 19, 1855, c. 68, § 1 increased the maximum to $500,000. The act of May 9, 1870, c. 224 (Acts & Res. 1870, p. 154) repealed previous acts (§ 69) and made more comprehensive provisions: cutting, storing and selling ice, or carrying on any agricultural, horticultural, mechanical, mining, quarrying or manufacturing business, printing and publishing—a maximum of $500,000 (§ 2); cooperation in any of the above businesses and cooperative trade—$50,000 (§ 3); opening outlets, canals or ditches, propagation of herrings and alewives—$5,000 (§ 4); making and selling gas for light in cities or towns—$500,000 (§ 5); common carriage of goods—$1,000,000 (§ 6). Later acts provided for the manufacture and distribution of gas for steam, heat, power and cooking; and for the furnishing of hydrostatic and pneumatic pressure. A maximum of $500,000 was prescribed. Acts of April 9, 1879, c. 202; May 15, 1885, c. 240; April 11, 1891, c. 189; May 27, 1893, c. 397. The same limit was prescribed for corporations to erect and maintain hotels, public halls, and buildings for manufacturing purposes. Acts of April 24, 1872, c. 244; March 9, 1888, c. 116.

[9]The maximum limit was raised to $1,000,000 for manufacturing and mechanical business by Act of March 22, 1871, c. 110, § 1; and for mining corporations by Act of May 3, 1875, c. 177, § 3; and to $100,000 for cooperative trade by Act of April 11, 1879, c. 210. By Act of April 14, 1873,

$1,000,000 was retained for some businesses until 1903.[10]

In many other states, including the leading ones in some industries, the removal of the limitations upon size was more recent. Pennsylvania did not remove the limits until 1905[11] Its first general act not having contained a maximum limit, that of $500,000 was soon imposed.[12] Later, it was raised to $1,000,000; and, for iron and steel companies, to $5,000,000.[13] Vermont limited the maximum to $1,000,000 until 1911,[14] when no amount over $10,000,000 was authorized if, in the opinion of a judge of the supreme court, such a capitalization would tend "to create a monopoly or result in restraining competition in trade."[15] Manyland limited until 1918 the capital of mining companies to $3,000,000; and prohibited them from holding more than 500 acres of land (except in Allegany

c. 179, the general act was extended to the common carriage of persons—except by railroad—and the limit of $1,000,000 was retained. The Act of April 14, 1874, c. 165, authorized incorporation for "any lawful business", not specifically provided for, and limited the amount of stock to $1,000,000. The maximum limit for manufacturing and mechanical corporations was removed by Act of March 28, 1899, c. 199. For all the other corporate purposes, the limitations above-named remained until the passage of the Business Corporation Law, June 17, 1903, c. 437. By that time commissions with power to supervise the issues of public service corporations had long been established. Act of June 11, 1885, c. 314; Act of June 5, 1894, c. 450; Act of June 5, 1894, c. 452; Act of June 9, 1894, c. 462.

[10]For all except mechanical and manufacturing corporations, the limitations set out in notes 8 and 9, *supra*, remained until the passage of the Business Corporation Law, June 17, 1903, c. 437.

[11]Act of April 22, 1905, No. 190, amending Act of February 9, 1901, No. 1; 5 Purdon's Digest, 1905-09 Supp. (13th ed.), p. 5340.

[12]The first Act passed in 1849, L. 1849, No. 368, p. 563, contained no limit. But a limit of $500,000 was imposed by Act of July 18, 1863, No. 949, L. 1864, p. 1102.

[13]The limit was raised to $1,000,000 for iron and steel corporations by Act of March 25, 1873, No. 4, L. 1873, p. 28, and it was extended to other corporations by Act of April 29, 1874, L. 1874, p. 73, which also increased the limit for the former to $5,000,000. The Act of April 18, 1873, No. 54, L. 1873, p. 76, had required that the Attorney General be satisfied of the reasonableness of so large a capitalization.

[14]Pub. Stat. (1906), Tit. 25, c. 187, § 4311, p. 830.

[15]Act of January 28, 1911, No. 143, L. 1910, pp. 140, 141-142. This provision was repealed by General Corporation Act, April 1, 1915, No. 141, L. 1915, p. 222.

County, where 1,000 acres was allowed).[16] New Hampshire did not remove the maximum limit until 1919.[17] It had been $1,000,000 until 1907,[18] when it was increased to $5,000,000.[19] Michigan did not remove the maximum limit until 1921.[20] The maximum, at first $100,000,[21] had been gradually increased until in 1903 it became $10,000,000 for some corporations and $25,000,000 for others;[22] and in 1917 became $50,000,000.[23] Indiana did not remove until 1921 the maximum limit of $2,000,000 for petroleum and natural gas corporations.[24] Missouri did not remove its maximum limit until 1927.[25] Texas still has such a limit for certain corporations.[26]

(b) Limitations upon the scope of a business corporation's powers and activity were also long universal. At first, corporations could be formed under the general laws only for a limited

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[16]Bagby's Code (1911), Art. 23, § 245, p. 648; repealed by Act of April 10, 1918, c. 417, L. 1918, p. 884.

[17]Business Corporation Law, March 28, 1919, c. 92, L. 1919, p. 113.

[18]Pub. Stat. (1901), c. 147, § 6, p. 470.

[19]Act of April 5, 1907, c. 129, L. 1907, p. 131.

[20]General Corporation Act, No. 84, April 26, 1921, L. 1921, p. 125, contains no limit on the amount of stock. Corporate life is limited to 30 years, § 5(b).

[21]Act 148, May 18, 1846, § 6, L. 1846, pp. 265, 267—corporation for mining or manufacturing iron, copper, etc.

[22]Act 232, June 18, 1903, 3 Howell's Mich. Stat. (1914), § 9533, p. 3815. The $25,000,000 maximum was for mercantile and manufacturing corporations. It had previously been raised to $5,000,000 by Act 232, September 19, 1885, § 2, L. 1885, p. 343. For mining corporations, a different maximum was fixed: $500,000 by Act 41, February 5, 1853, L. 1853, p. 53; $2,500,000 by Act 113, May 11, 1877, § 4, L. 1877, p. 87; and $10,000,000 by Act 233, September 17, 1903, Howell's Mich. Stat. (1914), § 7783, p. 3158, § 7804, p. 3165.

[23]Act 254, May 10, 1917, § 2, L. 1917, pp. 529, 530. See Dodge *v.* Ford Motor Co., 204 Mich. 459, 494.

[24]Until 1921, corporations for various objects were formed under various acts. For mining corporations, a limit of $2,000,000 was prescribed. 2 Burns' Ind. Stat. 1914), § 5137; 2 *id.* (1926), § 5547. In 1921, a general act, applicable to corporations for any lawful business, was passed, without limitation on the amount of stock. Act of February 28, 1921, c. 35, L. 1921, p. 93.

[25]By Act of March 30, 1907, L. 1907, p. 166, the maximum was increased to $50,000,000 from the $10,000,000 limit previously in force; Rev. Stat. 1899, c. 12, Art. 9, § 1320, p. 429; Rev. Stat. 1919, c. 90, Art. 7, § 10152. The act was repealed and no maximum provided in Act of April 8, 1927, L. 1927, p. 395; 1927 Supp. to Rev. Stat. § 10152.

[26]I Rev. Stat. (1925), Tit. 32, Art. 1302, ¶¶ 15, 16, 27. See Act of March 9, 1925, c. 51, L. 1925, p. 188.

number of purposes—usually those which required a relatively large fixed capital, like transportation, banking, and insurance, and mechanical, mining, and manufacturing enterprises.[27] Permission to incorporate for "any lawful purpose"[28] was not common until 1875; and until that time the duration of corporate franchises was generally limited to a period of 20, 30, or 50 years.[29] All, or a majority, of the incorporators or directors, or both, were required to be residents of the incorporating state.[30] The powers which the corporation might exercise in carrying out its purposes were sparingly conferred and strictly construed. Severe limitations were imposed on the amount of indebtedness, bonded or otherwise.[31] The power to hold stock in other corporations was not con-

[27]See notes 6 and 8, *supra*. The first general act in New Jersey was that of February 25, 1846, L. 1846, p. 64. In Michigan—May 18, 1846, Act 148, L. 1846, p. 265. In Illinois—February 10, 1849, L. 1849, p. 87. In Pennsylvania—April 7, 1849, No. 368, L. 1849, p. 563. In Massachusetts—May 15, 1851, c. 133, Gen. Stat. 1860 (2 ed.), p. 341. In Maine—March 19, 1862, c. 152, L. 1862, p. 118. In Delaware—March 21, 1871, c. 152, 14 Del. L. 229. In general, the objects of incorporation under these acts were limited to mining, manufacturing, mechanical or chemical business; separate acts governed the formation of banking, insurance, and transportation companies. Authority to incorporate for mercantile business, where specifically provided, was given relatively late. *E. g.*, Md. Laws 1894, c. 599; Tenn. Acts 1887, c. 139; Vt. Laws 1884, No. 105; compare Ind. Laws 1889, c. 81, § 1. And see Cook on Corporations (1889), p. 91: "The general corporation laws [of Pennsylvania] do not provide for mercantile corporations, but these are practically incorporated by means of 'partnership associations'. . . ."

[28]New York—L. 1866, c. 838, p. 1896; L. 1875, c. 611, p. 755. Illinois—July 1, 1872, L. 1872, p. 296. Massachusetts—Act of April 14, 1874, c. 165, § 1. Maine—February 3, 1876, c. 65, L. 1876, p. 51. Other States followed shortly.

[29]In 1903, almost half the states limited the duration of corporate existence to periods of from 20 to 50 years. See Report of the Committee on Corporation Laws of Massachusetts (1903), pp. 162-164.

[30]*E. g.*, Calif. Civ. Code (1885), § 285; Conn. Gen. Stat. (1888), § 1944; Ill. Rev. Stat. (1891), c. 114, § 11; Me. Rev. Stat. (1883), pp. 412, 467; Md. Gen. L. (1888), p. 299; Ohio Rev. Stat. (1886), § 3236; Pa. Dig. (Purdon's 1905), Tit. Corporations, § 63. Compare Wis. Stat. (1908), c. 85, § 1750 (chief managing officer or superintendent must reside in state, except in case of interstate railroad).

[31]See, *e. g.*, N. Y. Laws 1825, p. 448, § 3, 1 Rev. Stat. (1852), c. 18, Tit. 4, § 3, p. 1175; N. Y. Laws 1875, c. 611, § 22; Ill. Laws 1849, p. 87, § 22, p. 92; Ill. Laws 1872, p. 296, § 16, p. 300; Pa. Laws 1874, p. 73, § 13, p. 80; Maine Laws 1867, p. 72, § 24, p. 75; N. J. Laws 1846, p. 64, § 28, p. 69; N. J. Laws 1874, p. 124, § 16, p. 129. In 1903, almost half the states retained limitations on corporate indebtedness. See Report of the Committee on Corporation Laws of Massachusetts (1903), pp. 165-166.

ferred or implied.[32] The holding company was impossible.

(c) The removal by the leading industrial States of the limitations upon the size and powers of business corporations appears to have been due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them; because local restriction would be circumvented by foreign incorporation. Indeed, local restriction seemed worse than futile. Lesser States, eager for the revenue[33] derived from the traffic in charters, had removed safeguards from their own incorporation laws.[34] Companies were early

[32]See Noyes, Intercorporate Relations (2d ed., 1909), pp. 473-498; Morawetz, Private Corporations (2d ed., 1886), sec. 431. New Jersey was the first state to confer the general power of intercorporate stockholding. N. J. Laws 1888, pp. 385, 445, cc. 269, 295; N. J. Laws 1893, c. 171, p. 301. See Gilbert H. Montague, Trusts of Today (1904), pp. 20-21; C. R. Van Hise, Concentration and Control (rev. ed., 1914), p. 70; W. Z. Ripley, Trusts, Pools and Corporations (rev. ed., 1916), pp. xix-xx; Eliot Jones, The Trust Problem in the United States (1921), p. 30; Maurice H. Robinson, The Holding Corporation, 18 Yale Review, pp. 390, 406-407. Although unconditional power was not conferred until the Act of 1893, *supra*, it had been the practice of corporations formed in New Jersey to purchase the shares of other corporations. See Edward S. Keasbey, New Jersey and the Great Corporations, 13 Harvard Law Review, pp. 198, 207, 208. In no other state had there been a provision permitting the formation of holding companies, although by special act, notably in Pennsylvania, a few such companies had been formed. See James C. Bonbright and Gardiner C. Means, The Holding Company (1932), pp. 58-64. The scandal to which the series of Pennsylvania holding-company charters gave rise led to a constitutional amendment in that state forbidding the grant of special charters. Pa. Laws 1874, p. 8; Pa. Const., Art. III, Sec. 7. See Bonbright and Means, *supra*, at p. 60. New York, like other states, had specifically prohibited intercorporate stockholding, except where the stock held was that of a corporation supplying necessary materials to the purchasing corporation, or where it was taken as security for, or in satisfaction of, an antecedent debt. N. Y. Laws 1848, c. 40, § 8; 1876, c. 358; 1890, c. 564, § 40; 1890, c. 567, § 12. See De La Vergne Co. v. German Savings Institution, 175 U. S. 40, 54-58.

[33]The filing fees and franchise taxes are commonly measured by the authorized or issued stock. See National Industrial Conference Board, State and Local Taxation of Business Corporations (1931), Appendix B, pp. 138-159. And for the earlier laws, utilizing the same basis, see Report of the Massachusetts Committee on Corporation Laws (1903), pp. 265-288; House Committee on the District of Columbia, Report of Hearings of January 16, 1905, on H. R. 11811 and 12303 (Gov't Ptg. Office 1905).

[34]The traffic in charters quickly became widespread. In 1894 Cook on Stock and Stockholders (3d ed.) Vol. II, pp. 1604-1605 thus described the situation:

formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive.[35] The states joined

"New Jersey is a favorite state for incorporations. Her laws seem to be framed with a special view to attracting incorporation fees and business fees from her sister states and especially from New York, across the river. She has largely succeeded in doing so, and now runs the state government very largely on revenues derived from New York enterprises. . . .

"Maine formerly was a resort for incorporators, but a recent decision of its highest court holding stockholders liable on stock which has been issued for property, where the court thought the property was not worth the par value of the stock, makes Maine too dangerous a state to incorporate in, especially where millions of dollars of stock are to be issued for mines, patents and other choice assortments of property. . . .

"West Virginia for the past ten years has been the Snug Harbor for roaming and piratical corporations. . . . The manufacture of corporations for the purpose of enabling them to do all their business elsewhere seems to be the policy of this young but enterprising state. Its statutes seem to be expressly framed for that purpose. . . ."

In 1906 John S. Parker thus described the practice, in his volume Where and How—A Corporation Handbook (2d ed.), p. 4: "Many years ago the corporation laws of New Jersey were so framed as to invite the incorporation of companies by persons residing in other states and countries. The liberality and facility with which corporations could there be formed were extensively advertised, and a great volume of incorporation swept into that state. . . .

"The policy of New Jersey proved profitable to the state, and soon legislatures of other states began active competition. . . .

"Delaware and Maine also revised their laws, taking the New Jersey act as a model, but with lower organization fees and annual taxes. Arizona and South Dakota also adopted liberal corporation laws, and contenting themselves with the incorporation fees, require no annual state taxes whatever.

"West Virginia for many years has been popular with incorporators, but in 1901, in the face of the growing competition of other states, the legislature increased the rate of annual taxes." And West Virginia thus lost her popularity. See Conyngton and Bennett, Corporation Procedure (rev. ed. 1927), p. 712. On the other hand, too drastic price cutting was also unprofitable. The bargain prices in Arizona and South Dakota attracted wild cat corporations. Investors became wary of corporations organized under the laws of Arizona or South Dakota and both states fell in disrepute among them and consequently among incorporators. See Conyngton on Corporate Organizations (1913), ch. 5.

[35]Thus, in its pamphlet, "Business Corporations Under the Laws of Maine" (1903), the Corporation Trust Co. enumerated among the advantages of the Maine laws: the comparatively low organization fees and annual taxes; the absence of restrictions upon capital stock or corporate indebtedness; the authority to issue stock for services as well as property, with the judgment

in advertising their wares.[36] The race was one not of diligence but of laxity.[37] Incorporation under such laws was possible;

of the directors as to their value conclusive; and, significantly enough, "the method of taxation, which bases the annual tax upon the stock issued, does not necessitate inquiry into or report upon the intimate affairs of the corporation." See also its pamphlet "Business Corporations Under the Laws of Delaware" (1907). See also the Red Book on Arizona Corporation Laws (1908), published by the Incorporating Company of Arizona, especially p. 5: "The remoteness of Arizona from the Eastern and Southern States has in a measure delayed the promulgation of the generousness of its laws. New Jersey, Delaware and West Virginia have become widely known as incorporating states. More recently Arizona, Dakota, New Mexico and Nevada have come into more or less prominence by the passage of laws with liberal features."

[36]Thus, in an official pamphlet containing the corporation laws of Delaware (1901), the Secretary of State wrote in the preface: "It is believed that no state has on its statute books more complete and liberal laws than these;" and the outstanding advantages were then enumerated. See also a pamphlet "Organization of Corporations," issued by the Secretary of State of Maine in 1904. See also "The General Corporation Act of New Jersey" (1898), edited by J. B. Dill, issued by the Secretary of State: "Since 1875 it has been the announced and settled policy of New Jersey to attract incorporated capital to the State. . . ." P. xvii. And "The General Corporation Laws of West Virginia" (1905), published by the Secretary of State, containing, at pp. 209-210, a summary of the advantages of incorporating in West Virginia. For other examples, see Henry R. Seager and Charles A. Gulick, Jr., Trust and Corporation Problems (1929), c. 4.

[37]A change in the policy of New Jersey was urged by Woodrow Wilson in his inaugural address as Governor. "If I may speak very plainly, we are much too free with grants of charters to corporations in New Jersey. A corporation exists, not of natural right, but only by license of law, and the law, if we look at the matter in good conscience, is responsible for what it creates. . . . I would urge, therefore, the imperative obligation of public policy and of public honesty we are under to effect such changes in the law of the State as will henceforth effectually prevent the abuse of the privilege of incorporation which has in recent years brought so much discredit upon our State. . . . If law is at liberty to adjust the general conditions of society itself, it is at liberty to control these great instrumentalities which nowadays, in so large part, determine the character of society." Minutes of Assembly of New Jersey, January 17, 1911, pp. 65, 69; reprinted in Public Papers of Woodrow Wilson (ed. by Baker and Dodd), Vol. II, pp. 273, 274, 275. In 1913 the so-called "Seven-Sisters" Acts were passed by New Jersey, forbidding, among other things, intercorporate stockholding. Laws 1913, c. 18. These, in turn, were repealed in 1917. Laws 1917, c. 195. The report recommending the repeal stated: "Those laws now sought to be repealed are

and the great industrial States yielded in order not to lose wholly the prospect of the revenue and the control incident to domestic incorporation.

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harmful to the State because there is much uncertainty as to their meaning, with the result that those who would have otherwise incorporated here or remained here are going to other States. There is no gain to the people of the country, but this State loses a revenue which is perfectly legitimate. We doubt not that much of the adverse criticism outside of the State which was directed against New Jersey and its corporation laws prior to 1913 was due as much to the desire to divert the organization of corporations to other States as it was to prevent evils which might have arisen, and New Jersey fell for the criticism. To whatever cause may be attributed the loss of revenue to the State, it is plain that it is a condition and not a theory which confronts the State, as the following figures will show: . . . Such losses mean a serious depletion of the revenues of the State, and, unless a different policy is pursued, it will not be long before the corporation business of the State will have been reduced to a minimum. We believe such conditions justify the appointment of the Commission and will also justify the Legislature in adopting the result of our investigation and embodied in the proposed revision." Report of the Commission to Revise the Corporation Laws of New Jersey, 1917, pp. 7-8.

For more recent movements, see A. A. Berle and Gardiner C. Means, The Modern Corporation and Private Property (1932), p. 206, n. 18: "As significant of the trend towards that corporate mechanism with the broadest powers to the management, it is interesting to note the steady trend towards the states having a loose incorporation law. Of the 92 holding corporations mentioned above [those whose securities were listed on the New York Stock Exchange and were active in 1928] 44 were organized in Delaware, all of them being formed since 1910. Indeed, of the 44 holding corporations now chartered in that state, 25 were incorporated there between the years 1925 and 1928. In the less liberal New York State 13 of the above holding companies were formed, 6 of them having been chartered between 1910 and 1920, while only 4 were formed since 1920. Ten of the holding companies were chartered in Maryland, one in 1920 and the remaining 9 between 1923 and 1928, presumably in large measure as a result of the looseness of the Maryland corporation law of 1923. New Jersey, a relatively popular state at the turn of the century shows only two of the holding company charters granted there since 1910; while Virginia shows 7 such charters.

"Combined holding and operating corporations likewise show a steady trend towards Delaware. Of the whole list, 148 of the 573 corporations hold Delaware charters, most of them relatively recent; New York is second with 121, most of them relatively old; New Jersey third with 87, most of which grow out of the great merger period from 1898-1910."

Corporations formed in one state by citizens of another state, to do business in the state of their residence, were frequently subjected to collateral

The history of the changes made by New York is illustrative. The New York revision of 1890, which eliminated the maximum limitation on authorized capital, and permitted intercorporate stockholding in a limited class of cases,[38] was passed after a migration of incorporation from New York, attracted by the more liberal incorporation laws of New Jersey.[39] But the changes made by New York in 1890 were not sufficient to stem the tide.[40] In 1892, the Governor of New York approved a special charter for

attack. Generally the courts felt bound to uphold the corporate status. See the cases in J. H. Sears, The New Place of the Stockholder (1929), Appendix G. Occasionally, however, states legislated against the practice. Thus California enacted that the statutory liability of stockholders should apply to those in foreign as well as in domestic corporations. In two cases where the foreign corporation was organized specifically to do business in California this provision was held applicable. Pinney *v.* Nelson, 183 U. S. 144; Thomas *v.* Matthiessen, 232 U. S. 221. And more recently this Court has sustained a constitutional provision of Virginia which prohibits foreign public service companies from doing an intrastate business in the state. Railway Express Agency *v.* Virginia, 282 U. S. 440. The provision was adopted in the light of widespread incorporation of such companies in West Virginia and New Jersey. See Debates of Constitutional Conventon of Virginia, 1901-1902, Vol. II, p. 2811.

[38]One corporation was allowed to hold stock in others so long as the latter were engaged in manufacturing materials, etc., necessary for the former; and in others, which used products of the former. Business Corporation Law, 1890, c. 567, § 12.

[39]See note 34, *supra.*

[40]See Report of N. Y. Special Joint Committee on Trusts, March 9, 1897, 120th Sess., No. 30, pp. 3-4: "When in 1890 the Court of Appeals in this State pronounced its final judgment against the system of trust organization then in vogue [People of New York *v.* North River Sugar Refining Co., 121 N. Y. 582], the 'trust' became a thing of the past, existing trust agreements were dissolved and under the permission of existing laws the constituent elements held together under such agreements, became incorporated in the State of New Jersey and in other jurisdictions, where, either by accident or by design, the law of incorporation was so adjusted that by the simplest formality a trust declared unlawful and a conspiracy against public welfare might continue its career. . . .

"The corporation laws of the State of New York at that time differed essentially from the laws of the State of New Jersey in that they did not, as did the latter, permit the acquisition by one corporation of the capital stock of another, and consequently there followed an immediate migration of trusts to the State of New Jersey to secure corporate charters there and thus avoid complications in which the decision of the Court of Appeals threatened to involve them."

the General Electric Company, modelled upon the New Jersey Act, on the ground that otherwise the enterprise would secure a New Jersey charter.[41] Later in the same year the New York corporation law was again revised, allowing the holding of stock in other corporations.[42] But the New Jersey law still continued to be more attractive to incorporators.[43] By specifically providing that corporations might be formed in New Jersey to do all their business elsewhere,[44] the state made its policy unmistakably clear. Of the seven largest trusts existing in 1904, with an aggregate capitalization of over two and a half billion dollars, all were organized under New Jersey law; and three of these were formed in 1899.[45] During the first seven months of that year, 1336 corporations were organized under the laws of New Jersey, with an aggregate authorized capital of over two billion dollars.[46] The Comptroller of New

[41]N. Y. Laws 1892, c. 323. "The measure is approved because it is claimed that its objects cannot well be secured under the general law, and because its approval will keep within the State a corporation which professes to be ready to invest a large amount of capital, and which, without the concessions allowed by its proposed charter, would be incorporated under the laws of New Jersey." Public Papers of Governor Flower, 1892, p. 104. Quoted in James B. Dill, "Some Aspects of New Jersey's Corporate Policy", Address before the Pennsylvania Bar Association, June 29, 1903, Rep. Pa. Bar Ass'n., 1903, pp. 265, 267.

[42]N. Y. Laws 1892, c. 688, § 40.

[43]The New York Evening Post, March 23, 1896, said: "The *Evening Post* has frequently pointed out that New York capital is driven to shelter in New Jersey by reason of the more liberal laws of that State governing the incorporation of companies as compared with the laws of New York. Nearly all large corporations doing business in this City and State are incorporated under the laws of New Jersey or some other State, where more liberal laws prevail and in which inducements are thereby held out to attract capital thither and make it their legal home."

[44]N. J. Laws 1892, p. 90. In 1894, New Jersey provided by statute that corporations of another state should be subjected to the same taxes, license and other requirements in New Jersey as are imposed on New Jersey corporations by such other state. Laws 1894, c. 228, § 3. The statute was in retaliation for the hostile legislation of some of the other States regarding foreign corporations." J. B. Dill, The General Incorporation Act of New Jersey (1898), p. 100.

[45]See Moody, The Truth About the Trusts, p. 453. Of the 298 corporations listed as "lesser industrial trusts," 150 had New Jersey charters. *Id.*, pp. 454-467.

[46]Edward K. Keasbey, "New Jersey and the Great Corporations," Address before the American Bar Association, August 28, 1899, reprinted in 13 Harvard Law Review, p. 198.

York, in his annual report for 1899, complained that "our tax list reflects little of the great wave of organization that has swept over the country during the past year and to which this state contributed more capital than any other state in the Union." "It is time," he declared, "that great corporations having their actual headquarters in this State and a nominal office elsewhere, doing nearly all of their business within our borders, should be brought within the jurisdiction of this State not only as to matters of taxation but in respect to other and equally important affairs."[47] In 1901 the New York corporation law was again revised.[48]

The history in other states was similar. Thus, the Massachusetts revision of 1903 was precipitated by the fact that "the possibilities of incorporation in other states have become well known, and have been availed of to the detriment of this Commonwealth."[49]

Third. Able, discerning scholars[50] have pictured for us the eco-

[47]Report of Comptroller of New York, 1890, p. xxvii.

[48]N. Y. Laws 1901, cc. 355, 520.

[49]Report of Committee on Corporation Laws, Massachusetts (1903), p. 19. The Governor of Michigan, in his Message to the Legislature in 1921, said of the corporation laws of that state: "Because of their inadequacy to meet modern needs and requirements, and the failure to accord domestic corporations the same rights granted to those organized outside of the state, most of our business corporations are being organized in other states, only to return here as foreign corporations." Journal of House of Representatives of Michigan, 1921, pp. 31, 37; reprinted in Messages of the Governors of Michigan (Michigan Historical Commission, 1927), Vol. 4, pp. 775, 784. In 1921 the corporation laws of Michigan were revised, eliminating, among other things, the maximum limitation on capital stock. See note 20, *supra*.

The effect of the policy of West Virginia was described by President Henry M. Russell in an address before the West Virginia Bar Association in 1891. In the six years ending January 1, 1889, he stated, 330 charters were issued by the state to corporations having their principal places of business elsewhere. Of these, 101 were to be in the District of Columbia, and 65 in New York. "The neighboring State of Pennsylvania has adopted very stringent laws for the government of its corporations. . . . So our Pennsylvania friends who have patent rights or gold mines, come to West Virginia. . . . Of our 330 corporations, 80 were to have their principal offices in Pennsylvania. Our other neighbor, the State of Ohio, carries upon its statute book a law imposing a double liability on the stockholders for the debts of the corporation . . . and 30 out of the 330 have their principal offices in Ohio. Thus 284 of the 330 are found in the cities of Washington and New York and the States of Pennsylvania and Ohio. . . . It is unjust to our sister States." 27 American Law Review, p. 105.

[50]Adolf A. Berle, Jr. and Gardiner C. Means, The Modern Corporation and Private Property (1932). Compare William Z. Ripley, Main Street and Wall Street (1927).

nomic and social results of thus removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by stockholders—results not designed by the States and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving "corporate system" with the feudal system; and to lead other men of insight and experience to assert that this "master institution of civilised life" is committing it to the rule of a plutocracy.[51]

The data submitted in support of these conclusions indicate that in the United States the process of absorption has already advanced so far that perhaps two-thirds of our industrial wealth has passed from individual possession to the ownership of large corporations whose shares are dealt in on the stock exchange;[52] that 200 non-banking corporations, each with assets in excess of $90,000,000, control directly about one-fourth of all our national wealth, and that

[51]Thorstein Veblen, Absentee Ownership and Business Enterprise (1923), p. 86; Walther Rathenau, Die Neue Wirstchaft (1918), pp. 78-81.

[52]Berle and Means, The Modern Corporation and Private Property, Preface, p. vii.

their influence extends far beyond the assets under their direct control;[53] that these 200 corporations, while nominally controlled by about 2,000 directors, are actually dominated by a few hundred persons[54]—the negation of industrial democracy. Other writers have shown that, coincident with the growth of these giant corporations, there has occurred a marked concentration of individual wealth;[55] and that the resulting disparity in incomes is a major cause of the

[53] *Id.*, pp. 31-32. Compare H. W. Laidler, Concentration of Control in American Industry (1931).

[54] Berle and Means, p. 46, n. 34. Compare James C. Bonbright and Gardiner C. Means, The Holding Company (1932); Regulation of Stock Ownership in Railroads, H. R. No. 2789, 71st Cong., 3d Sess. (Dr. W. M. W. Splawn); Hearings before Senate Judiciary Committee, 72d Cong., 2d Sess., on S. 5267, February 14, 1933 (John Frey); Stanley Edwin Howard, Business, Incorporated, in Facing the Facts (J. G. Smith, ed., 1932), p. 124 *et seq.*; Lewis Corey, The House of Morgan, pp. 354-356, 441-448.

[55] Federal Trade Commission, National Wealth and Income (1926); S. Howard Patterson and Karl W. H. Scholz, Economic Problems of Modern Life (1927), c. 22; Lewis Corey, The New Capitalism, in American Labor Dynamics (J. B. S. Hardman, ed., 1928), c. 3; Stuart Chase, Prosperity—Fact or Myth (1929), c. 9; H. Gordon Hayes, Our Economic System (1929), Vol. II, c. 56; Willard E. Atkins et al., Economic Behavior (1931), Vol. II, c. 34; Harold Brayman, Wealth Rises to the Top, in Outlook and Independent, Vol. 158, No. 3 (May 20, 1931), p. 78; Buel W. Patch, Death Taxes and The Concentration of Wealth, in Editorial Research, Reports, Vol. II, 1931, No. 11 (September 18, 1931), pp. 635-637; Frederick C. Mills, Economic Tendencies in the United States (National Bureau of Economic Research, in Co-operation with the Committee on Recent Economic Changes, 1932), pp. 476-528, 549-558; Paul H. Douglas, Dividends Soar, Wages Drop, in World Tomorrow, December 28, 1932, p. 610; reprinted in Congressional Record, 72nd Cong., 2d Sess., Vol. 76, p. 2291 (January 20, 1933). Compare Morris A. Copeland, The National Income and its Distribution, in Recent Economic Changes in the United States (Report of President's Conference on Unemployment, Committee on Recent Economic Changes, 1929), Vol. II, c. 12; Willford I. King, The National Income and Its Purchasing Power (1930). George L. Knapp pointed out that in 1929, 504 persons had $1,185,135,300 taxable net income, whereas the aggregate gross market value of all the cotton and all the wheat grown in the United States in 1930 by the 2,332,000 cotton and wheat farmers was only $1,191,451,000 (see Labor, March 31, 1931, p. 4; *id.*, May 19, 1931, p. 4; *id.*, November 29, 1932, p. 4); and that the estimate of the aggregate dividends and interest paid in the United States in 1932 was $1,642,000,000, whereas that of factory wages was $903,000,000. See Labor, February 14, 1933, p. 4. [Compare the final figures in Bureau of Internal Revenue, Statistics of Income for 1929, pp. 5, 61, showing that 513 persons had taxable net income of $1,212,098,784.]

; George W. Norris, The Spider Web of Wall Street, Cong. Rec., 72d Cong., 2d Sess., pp. 4917-4928 (February 23, 1933).

existing depression.[56] Such is the Frankenstein which States have created by their corporation laws.[57]

Fourth. Among these 200 corporations, each with assets in excess of $90,000,000, are five of the plaintiffs. These five have in the aggregate, $820,000,000 of assets;[58] and they operate, in the several States, an aggregate of 19,718 stores.[59] A single one of these giants operates nearly 16,000.[60] Against these plaintiffs, and other owners of multiple stores, the individual retailers of Florida are engaged in a struggle to preserve their independence—perhaps a struggle for existence. The citizens of the State, considering themselves vitally interested in this seemingly unequal struggle, have undertaken to aid the individual retailers by subjecting the owners of multiple stores to the handicap of higher license fees. They may have done so merely in order to preserve competi-

[56]Compare J. A. Hobson, Poverty in Plenty (1931), chs. 2, 4; Arthur B. Adams, The Business Depression of 1930, in American Economic Review, Vol. 21 (March, 1931, supplement), p. 1[illegible]; John A. Ryan, The Industrial Depression of 1929-1931, in Questions of The Day (1931), pp. 209-217; Philip F. LaFollette, Message to the Legislature of Wisconsin, November 24, 1931, pp. 6-8; Fred Henderson, Economic Consequences of Power Production (1931), c. 1; Paul Blanshard, Socialist and Capitalist Planning, in Annals of The American Academy of Political and Social Science, Vol. 162 (July, 1932), pp. 6-8; Arthur Dahlberg, Jobs, Machines, and Capitalism (1932), pp. 205-208; Scott Nearing, Must We Starve? (1932), p. 119; George Soule, The Maintenance of Wages, in Proceedings of The Academy of Political Science, Vol. 14, No. 4 (January, 1932), pp. 87, 91; Christ Christensen, Major Problems of Readjustment, in *id.*, Vol. 15, No. 2 (January, 1933), p. 235.

[57]Compare I. Maurice Wormser, Frankenstein, Incorporated (1931).

[58]See Berle and Means, The Modern Corporation and Private Property, p. 21. This figure includes the assets of Drug, Inc., which in 1928 acquired the stock of United Drug Co., which in turn controls through stock ownership the Louis K. Liggett Co. See Moody's Industrial Securities (1932), pp. 1215, 1217, 1219.

[59]The total is compiled from figures, as of December 31, 1930, in Report of Federal Trade Commission on Growth and Development of Chain Stores, Sen. Doc. No. 100, 72d Cong., 1st Sess. (1932), pp. 76-77. Compare English Co-operative Wholesale Society, Limited, [U. S.] Commerce Reports, February 18, 1933, p. 104.

[60]The Report of the Federal Trade Commission, *supra*, note 59, at p. 76, gives 15,738 as the number of stores operated by the Great Atlantic and Pacific Tea Co. The number operated by the other four plaintiffs is as follows: Louis K. Liggett Co., 549; Montgomery Ward & Co., 556; United Cigar Stores Co., 994; F. W. Woolworth Co., 1,881. *Ibid.*

tion. But their purpose may have been a broader and deeper one. They may have believed that the chain store, by furthering the concentration of wealth and of power and by promoting absentee ownership, is thwarting American ideals; that it is making impossible equality of opportunity; that it is converting independent tradesmen into clerks; and that it is sapping the resources, the vigor and the hope of the smaller cities and towns.[61]

The plaintiffs insist that no taxable difference exists between the owner of multiple stores and the owner of an individual store. A short answer to the contention has already been given, so far as required for the decision of this case. It is that the license fee is not merely taxation. The fee is the compensation exacted for the privilege of carrying on intrastate business in corporate form. As this privilege is one which a State may withhold or grant, it may charge such compensation as it pleases. Nothing in the Federal Constitution requires that the compensation demanded for the privilege should be reasonable. Moreover, since the authority to operate many stores, or to operate in two or more counties, is certainly a broader privilege than to operate only one store, or in only one county, there is in this record no basis for a finding that it is unreasonable to make the charge higher for the greater privilege.

A more comprehensive answer should, however, be given. The purpose of the Florida statute is not, like ordinary taxation, merely to raise revenue. Its main purpose is social and economic. The chain store is treated as a thing menacing the public welfare. The aim of the statute, at the lowest, is to preserve the competition of the independent stores with the chain stores; at the highest, its aim is to eliminate altogether the corporate chain stores from retail distribution. The legislation reminds of that by which Florida and other States, in order to eliminate the "premium system" in merchandising, exacted high license fees of merchants who offered

[61]Compare Montaville Flowers, America Chained (1931); H. E. Fryberger, The Abolition of Poverty (1931); W. H. Cameron, Our Juggernaut (1932); M. M. Zimmerman, The Challenge of Chain Store Distribution (1931), pp. 2-4; Godfrey M. Lebhar, The Chain Store—Boon or Bane? (1932), p. 59; James L. Palmer, Are These Twelve Charges Against the Chains True? in Retail Ledger, July 1929, reprinted in E. C. Buehler, Debate Handbook on the Chain Store Question (1930), p. 102; Edward G. Ernst and Emil M. Hartl, The Chain Store and the Community, in Nation, November 19, 1930, p. 545; John P. Nichols, Chain Store Manual (1932), c. 5.

trading stamps with their goods. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *Tanner* v. *Little*, 240 U. S. 369. Compare *Central Lumber Co.* v. *North Dakota*, 226 U. S. 157; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304.

The plaintiffs discuss the broad question whether the power to tax may be used for the purpose of curbing, or of exterminating, the chain stores by whomsoever owned. It is settled that a State "may carry out a policy" by "adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry." *Quong Wing* v. *Kirkendal*, 223 U. S. 59, 62; *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322, 329.[62] And since the Fourteenth Amendment "was not intended to compel the State to adopt an iron rule of equal taxation," *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 237, it may exempt from taxation kinds of business which it wishes to promote; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; and may burden more heavily kinds of business which it wishes to discourage. *Williams* v. *Fears*, 179 U. S. 271; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563; compare *Alaska Fish Co.* v. *Smith*, 255 U. S. 44. To do that has been the practice also of the Federal Government. It protects, by customs duties, our manufacturers and producers from the competition of foreigners. Compare *Hampton & Co.* v. *United States*, 276 U. S. 394, 411-413; also, *Billings* v. *United States*, 232 U. S. 261. It protects, by the oleomargarine laws, our farmers and dairymen from the competition of other Americans. Compare *McCray* v. *United States*, 195 U. S. 27. It eliminated, by a prohibitive tax, the issue of state bank notes in competition with those of national banks. Compare *Veazie Bank* v. *Fenno*, 8 Wall. 533. Such is the constitutional power of Congress and of the state legislatures. The wisdom of its exercise is not the concern of this Court.

Whether chain stores owned by individuals may be subjected to the discrimination here challenged need not, however, be decided. This case requires decision only of the narrower question—whether the State may freely apply discrimination in license fees against corporate chain stores. The essential difference between corporations

[62]Indeed, it has been urged that the taxation of the States and the Nation should be framed not with a view solely to the raising of revenue, but always for the purpose of promoting that social policy which the people deem wise.

and natural persons has been recognized by the Federal Government in taxing the income of businesses when conducted by corporations, while exempting a similar business when carried on by an individual or partnership. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 108, 158. It has, at other times, imposed upon businesses conducted by corporations heavier taxes than upon those conducted by individuals.[63] The equality clause of the Fourteenth Amendment presents no obstacle to a State, likewise, taxing businesses engaged in intrastate commerce differently according to the instruments by which they are carried on; provided the purpose of the discrimination is a permissible one, the discrimination employed a means appropriate to achieving the end sought, and the difference in the instruments so employed vital. Compare *Fort Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532. *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 373; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304. The corporate mechanism is obviously a vital element in the conduct of business. The encouragement or discouragement of competition is an end for which the power of taxation may be exerted. And discrimination in the rate of taxation is an effective means to that end.

The requirement of the equality clause that classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation," *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37, is here satisfied. Mere difference in degree has been widely applied as a difference justifying different taxation or regulation.[64] The difference in power between coroporations and natural persons is ample basis for placing them in different classes. Even as between natural persons, where the equality clause applies rigidly, differences in size furnish an adequate basis for discrimination in a tax rate. The size of estates, or of bequests, is the difference on which rest all the progressive inheritance taxes of the States and of the Nation. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Knowlton* v. *Moore*, 178 U. S. 41, 109; *Keeny* v. *New York*, 222 U. S. 525, 536; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Salomon* v. *State Tax Commission*, 278 U. S. 484. Differences in the size of incomes is the basis on which

[63]See the statutes cited in Quaker City Cab Co. *v.* Pennsylvania, 277 U. S. 389, 407-409, notes 5 and 6.

[64]See Louisville Gas & Electric Co. *v.* Coleman, 277 U. S. 32, 42-46, notes 1-6.

rest all progressive income taxes. *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 25. Differences in the size of businesses present, likewise, an adequate basis for different rates of taxation. Compare *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322, 331; *Pacific American Fisheries Co.* v. *Alaska*, 269 U. S. 269. And so do differences in the extent or field of operation.

The State might justify progressively higher license fees for corporations of larger size, or a more extended field of operation, on the oft asserted ground that such concerns are more efficient than smaller units and, hence, that they can, and should, contribute more to the public revenues. But the State need not rest the difference in tax rates on a ground so debatable as the assertion that efficiency increases with size.[65] The Federal Constitution does not require that taxes (as distinguished from assessments for betterments) be proportionate to the differences in benefits received by the taxpayers, compare *Illinois Central R. R. Co* v. *Decatur*, 147 U. S. 190, 197; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 203; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 76; *St. Louis & Southwestern Ry.* v. *Nattin*, 277 U. S. 157, 159; or that taxes be proportionate to the taxpayer's ability to bear the burden.

Since business must yield to the paramount interests of the community in times of peace as well as in times of war, a State may prohibit a business found to be noxious and, likewise, may prohibit incidents or excrescences of a business otherwise beneficent.

[65]Compare Hearings before Senate Committee on Interstate Commerce, pursuant to S. Res. 98, Sen. Doc. 62d Cong., 2d Sess., Vol. 1, p. 1147 *et seq.* (1912); Report of Federal Trade Commission on The Meat Packing Industry (1919), Pt. III, p. 118 *et seq.*; A. M. Kales, Contracts and Combinations in Restraint of Trade (1918), secs. 74-90; F. A. Fetter, Big Business and the Nation, in Facing the Facts (J. G. Smith, ed., 1932), pp. 186-213; F. A. Fetter, The Masquerade of Monopoly (1931), pp. 367-380; Myron W. Watkins, Large-Scale Production, in Encyclopaedia of The Social Sciences, vol. 9, p. 170; A. S. Dewing, A Statistical Test of the Success of Consolidations, Quarterly Journal of Economics, vol. 36, p. 84; Virgil Jordan, The Flight from the Centre, in Scribner's, Vol. 91, p. 262 (~~April~~ May, 1932); W. L. Thorp, The Changing Structure of Industry, in Recent Economic Changes (1929), pp. 167, 179-206; Glenn Frank, Big Men and Big Enterprise, Albany Evening News, December 7, 1931; December 18, 1931; Julius Klein, Assistant Secretary of Commerce, United States Daily, April 11, 1932, p.1; Frederick M. Feiker, Director, Bureau of Foreign and Domestic Commerce, U. S. Daily, February 27, 1932, p. 3; Carter D. Poland, Small Business Has Its Day, Nation's Business, March, 1933, p. 51; also, Camera dei Deputati, N. 1200-A, Relazione della Giunta Generale del Bilancio (April 29, 1932), pp. 45-47.

Glenn Frank, Thunder and Dawn (1932) pp. 106-110;

Mugler v. *Kansas*, 123 U. S. 623; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251; *Williams* v. *Arkansas*, 217 U. S. 79; *Engel* v. *O'Malley*, 219 U. S. 128; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157. Businesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade. If the State should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business as it prohibits excessive size or weight in motor trucks or excessive height in the buildings of a city. Compare *Morris* v. *Duby*, 274 U. S. 135; *Welch* v. *Swasey*, 214 U. S. 91; *Village of Euclid* v. *Ambler Co.*, 272 U. S. 365, 388. It was said in *United States* v. *United States Steel Corporation*, 251 U. S. 417, 451, that the Sherman Anti-Trust Act did not forbid large aggregations; but the power of Congress to prohibit corporations of a size deemed excessive from engaging in interstate commerce was not questioned.

The elimination of chain stores, deemed harmful or menacing because of their bigness, may be achieved by levelling the prohibition against the corporate mechanism—the instrument by means of which excessive size is commonly made possible. Or, instead of absolutely prohibiting the corporate chain store, the State might conclude that it should first try the more temperate remedy of curbing the chain by imposing the handicap of discriminatory license fees. Compare *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269, 274; *Hammond Packing Co.* v. *Montana*, 233 U. S. 331, 333-334; *Bradley* v. *Richmond*, 227 U. S. 477, 480. "Taxation is regulation just as prohibition is." *Compañia General de Tabacos* v. *Collector*, 275 U. S. 87, 96. And the State's power to make social and economic experiments is a broad one.

Fifth. The mere fact that the taxpayer is a corporation does not, of course, exclude it from the protection afforded by the equality clause. Corporations and individuals, aliens and citizens, are for most purposes in the same class. Ordinarily, they have the same civil rights; are entitled to the same remedies; are subject to the same police regulations; and are also subject to the same tax laws. Where such is the case, the corporation taxpayer is entitled, like the individual, to the protection of the equality clause against discrimination, however effected. Compare *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239. But the chief aim of the

Florida statute is apparently to handicap corporate chain stores—that is, to place them at a disadvantage, to make their success less probable. No other justification of the discrimination in license fees need be shown; since the very purpose of the legislation is to create inequality and thereby to discourage the establishment, or the maintenance, of corporate chain stores; since that purpose is one for which the power of taxation may be exerted; since higher license fees is an appropriate means of discouragement; and corporations have not the inherent right to engage in intrastate commerce. The clear distinction between the equality clause and the due process clause of the Fourteenth Amendment should not be overlooked in this connection. The mandate of the due process clause is absolute. That clause is of universal application. It knows not classes. It applies alike to corporations and to individuals, to citizens and to aliens, *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 411; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489. The equality clause, on the other hand, is limited in its operation to members of a class.

It is true that the Florida Anti-Chain Store Law, like others, is not drawn so as to apply only to giant corporate chains. In terms, it applies to the small corporations as well as to the large; and also to natural persons. But the history of such legislation indicates that these laws were aimed at the huge, publicly-financed corporations; and that the statutes were couched in comprehensive terms in the hope of thereby avoiding constitutional doubts raised by judicial statements that the equality clause applies alike to natural persons and corporations. It was said in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 402, that the equality clause precludes making the character of the owner the sole fact on which a discrimination in taxation shall depend. And in *Frost* v. *Corporation Commission*, 278 U. S. 515, 522, it was said (citing the *Quaker City Cab* case; *Kentucky Co.* v. *Paramount Exchange*, 262 U. S. 544, 550; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 154) " that a corporation is as much entitled to the equal protection of the laws as an individual". These statements require, in my opinion, this qualification. Whenever the discrimination is for a permitted purpose—as when a State, having concluded that activity by corporations should be curbed, seeks to favor businesses conducted by individuals—the corporate character of the owner presents a difference in ownership which may be made the sole basis of classifica-

tion in taxation, as in regulation.[66] The discrimination cannot, in such a case, be held arbitrary, since it is made in order to effect the permitted hostile purpose and is appropriate to that end. Compare *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 283-285; *New York* v. *New York & Albany Lighterage Co.*, 288 U. S. —.

Sixth. The plaintiffs contend, for a further reason, that there is no taxable difference justifying the discrimination in license fees. They assert that the struggle between them and the independently owned stores is, in fact, not an unequal one; and in support of this assertion, they call attention to those paragraphs in the bill which describe the cooperative chains of individual stores and their rapid growth. These paragraphs allege that by "affiliations and cooperative organizations single grocery [and other] store owners have adopted the best features of chain store merchandising and have secured substantially all the benefits derived therefrom, while at the same time they have avoided burdens of capital investment, insurance, etc., incident to the carrying of a large stock in a central warehouse". The bill sets forth how this has been achieved, describing in detail the recent advances in efficiency of such cooperative merchandising. It alleges, moreover, that the members of a cooperative chain have the superior advantage of the good will and personal interest of the individual owners, as compared with the hired managers of the regular chains; and that all these facts were known to the Legislature when it enacted the statute here challenged.

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[66]Compare Ernst Freund, Standards of American Legislation (1917) pp. 40-41: "So far as the business of banking and insurance have been carried on under corporate charters they have been the subject of thorough and detailed regulation, while private banking and the unincorporated forms of fraternal insurance remain to this day in the main unregulated and uncontrolled. Railroads have been built and operated from the beginning by corporate enterprise; thus legislation was called for and was made the instrument of exercising public power over operation, service and in some cases over rates; the express business, on the other hand, which happened to be carried on chiefly by unincorporated concerns, or at least did not seek special charters, practically escaped regulation and was not placed under administrative jurisdiction until the Rate Act of 1906; this tends to show that it was not merely the fact of being a common carrier subject to special power, but more particularly the fact of being a corporation asking for powers, which subjected the railroad company to the extensive and intensive legislative régime which it has experienced."

These allegations are admitted by the motion to dismiss; and they are supported by recent experience of which we may take notice.[67] But it does not follow that because the independently owned stores are overcoming through co-operation the advantages once possessed by chain stores, there is no taxable difference between the corporate chain and the single store. The State's power to apply discriminatory taxation as a means of preventing domination of intrastate commerce by capitalistic corporations is not conditioned upon the existence of economic need. It flows from the broader right of Americans to preserve, and to establish from time to time, such institutions, social and economic, as seem to them desirable; and, likewise, to end those which they deem undesirable. The State might, if conditions warranted, subject giant corporations to a control similar to that now exerted over public utility companies.[68] Or, the citizens of Florida might conceivably escape from the domination of giant corporations by having the State engage in business. Compare *Jones* v. *City of Portland*, 245 U. S. 217; *Green* v. *Frazier*, 253 U. S. 233; *Standard Oil Co.* v. *City of Lincoln*, 275 U. S. 504. But Americans seeking escape from corporate domination have open to them under the Constitution another form

[67]Federal Trade Commission, Report on Cooperative Grocery Chains, Sen. Doc. No. 12, 72nd Cong., 1st Sess.; Report on Cooperative Drug and Hardware Chains, Sen. Doc. No. 82, 72nd Cong., 1st Sess. See, also, A. E. Haase and V. H. Pelz, The Voluntary Chain, in Printer's Ink Monthly, February 1929, p. 29, *id.*, March 1929, p. 31, *id.*, April 1929, p. 52, *id.*, May 1929, p. 52; Paul H. Nystrom, Chain Stores (U. S. Chamber of Commerce, 1930), pp. 17, 21; Nystrom, Economics of Retailing (3rd ed., 1932), c. 13; Craig Davidson, Voluntary Chain Stores (1930); Marvin M. Black, Jr., Troubled Waters of Distribution, Outlook and Independent, May 15, 1929, p. 90; The Voluntary Chains (American Institute of Food Distribution, Inc., 1930); M. E. Bridston, Voluntary Chain Flourishes in Difficult Field, in Chain Store Review, April 1929, p. 12; "The Challenge of the Chains" Accepted by 500 Pacific Coast Grocers, Magazine of Business, July, 1928, p. 28. Compare Federal Trade Commission, Report on Cooperation in Foreign Countries, Sen. Doc. No. 171, 68th Cong., 2d Sess.; Huston Thompson, The Cooperative Movement in Foreign Countries, Congressional Digest, October 1925, p. 256; C. R. Fay, Co-operation at Home and Abroad (rev. ed. 1925); A. H. Enfield, Co-operation (1927); J. P. Warbasse, Co-operative Democracy (1923); Cedric Long, Consumers Co-operation, in A New Economic Order (Kirby Page, ed., 1930), p. 213; Charles R. Tuttle, The New Co-operative Order (1918); Charles T. Sprading, Mutual Service and Co-operation (1930), pp. 44-127; Henry Clay, Co-operation and Private Enterprise (1928).

[68]The general apprehension of corporations with huge capital was not allayed until after the introduction of two governmental devices designed to protect

of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of cooperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure.[69] That way is clearly open. For the fundamental difference between capitalistic enterprise and the cooperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts as justifying discrimination in both regulation and taxation.[70] *Liberty Warehouse Co.* v. *Burley Tobacco Growers Assn.*, 276 U. S. 71. Compare *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322.

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralysed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty. If the citizens of Florida share that belief, I know of nothing in the Federal Constitution which precludes the State from endeavoring to give it effect and prevent domination in intrastate commerce by subjecting corporate chains to discriminatory license fees. To that extent, the citizens of each State are still masters of their destiny.

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the rights and opportunities of the individual. Commissions to regulate public utilities—to curb the exaction of sanctioned monopolies. Anti-trust laws—to prevent monopolies in industry and commerce. When the Act to Regulate Commerce was passed in 1887, there were commissions in 25 States. Vanderblue and Burgess, Railroads (1923), p. 15. See M. H. Hunter, The Early Regulation of Public Service Corporations, 7 American Economic Review, p. 569, reprinted in Dorau, Materials for the Study of Public Utility Economics (1930), pp. 283-294.

[69]Compare Harold J. Laski, The Recovery of Citizenship (1928); Horace M. Kallen, Individualism (1933), pp. 235-241.

[70]See Frost *v.* Corporation Commission, 278 U. S. 515, 539, notes 8-16, 23.

SUPREME COURT OF THE UNITED STATES.

No. 301.—October Term, 1932.

Louis K. Liggett Company, et al., Appellants, *vs.* J. M. Lee, as Comptroller of the State of Florida, et al.	Appeal from the Supreme Court of Florida.

[March 13, 1933.]

Mr. Justice Cardozo, dissenting in part.

The graduation of a tax upon the business of a chain store may be regulated by the test of territorial expansion, and territorial expansion may be determined by the spread of business from one county into another.

Students of the chains have accepted the classification of the Census Bureau, which divides them into three groups: local, sectional and national. Census of 1930, Report on Retail Distribution by Chains; Lebhar, "The Chain Store," p. 20. Chains are local "if substantially all their stores are located in and around some one city." In 1930, the number of these was 5589. They are sectional if their "stores are located in some one section of the country, such as the New England states or the Pacific Coast states or in the Gulf Southwest or any other geographic division." Of these there were 1136. They are national if their "interests are broader than those of any one section of the country." Of these there were 321.

Statistics thus indicate that there is a definite line of cleavage between chains that serve consumers within a single territorial unit and those framed for larger ends. The business that keeps at home affects the social organism in ways that differ widely from those typical of a business that goes out into the world. It affects the social organism, but also it affects itself. With the lengthening of the chain there are new fields to be exploited. The door is opened to opportunities that have hitherto been closed. Where does the local have an end and the non-local a beginning? The

legislature had to draw the line somewhere, and it drew it with the county. Within the range of reasonable discretion its judgment must prevail. There is need to remember the varying significance of county lines for varying communities. From the beginnings of our history, the town has been the distinctive unit of government in the New England states and in many others of the North. In the South from the beginning the distinctive unit has been the county. Bryce, The American Commonwealth, (2nd edition, revised) vol. 1, part II, chap. 48, pp. 570, 571; K. H. Porter, County and Township Government in the United States, p. 60. Florida is largely an agricultural state. The census of 1930 shows three cities of over 100,000 (Jacksonville, 129,549, Miami, 110,637, and Tampa, 101,161); four between 20,000 and 40,000 (Orlando, West Palm Beach, Pensacola, and St. Petersburg); and seven between 10,000 and 20,000. Of these fourteen cities, all are in different counties. In a state with a population thus distributed, the boundaries of the county will have an approximate correspondence with the area of local business. When a chain goes beyond the county, beyond the traditional boundaries of local government, it puts the locality behind it, and elects to play for larger stakes.

Every new community is potentially a new centre of economic opportunity. There is then a hazard of new adventures, a tapping of new sources of dominance and profit. At once with this advance, the tax mounts into higher brackets, but does not mount again. There are not progressive increases when a business, after moving into one county, moves on again to others. The second county once attained, the rate is not affected though many more are added. The chain has made its choice, and for this it pays but once. It has put its local character away, and found alignment in another class. It is on the way to becoming an organization of another order, to becoming sectional or national. There is confirmation of this tendency in the facts stated in the bill as to the stores operated by the complainants and by those allowed to intervene. All who have gone beyond a single county do business in many more, or else in many states. One can imagine extreme cases, to be sure, where county lines may be crossed and the business remain local in substance, if not in form. The store in the new county may be next to the boundary line that separates from the old. So too the chain that is national in scope may have its Florida stores in one county and one only, in which event it is local *quoad*

its activities in Florida, whatever it may be beyond. Lawmakers are not required to legislate with an eye to exceptional conditions. Their search is for probabilities and tendencies of general validity, and these being ascertained, they may frame their rule accordingly. They are not required to legislate with an eye to forms of growth beyond the limits of their own state. In laying a tax upon a Florida chain their concern is with those activities that have social and economic consequences for Florida and her people. The question for them, and so for us, is not how a business might be expected to develop if its forms and lines of growth were to be predicted in the abstract without reference to experience. The question is how it *does* develop in normal or average conditions, and the answer to that question is to be found in life and history. When the problem is thus approached, the movement from one county to another becomes in a very definite sense the crossing of a frontier, a change as marked as the difference between wholesale trade and retail. *Cook* v. *Marshall Co.*, 196 U. S. 261. So at least the legislature might not unreasonably believe, and act on that belief in the formulation of the law. *O'Gorman & Young, Inc.* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 257.

Corresponding to the change of opportunity—to the change at the periphery—that accompanies the expansion of the area of action are changes at the centre. The chain that is merely local is likely to be organized more simply than the one that spreads itself afar. Methods at the point of origin must be adapted to expanding needs. Other things being equal, there will be a new concentration of control, a new unity of administration, a new emphasis of the very features that distinguish chain stores from others and supply an important reason for taxing the two differently, whether within the county or without. *Tax Commissioners* v. *Jackson*, 283 U. S. 527, 534. Movement from the locality to other fields of activity is thus a symptom of an inner change. This, at least, is its normal meaning, its meaning, or so the legislature might fairly say, in the common run of cases. If so, the scale of payment may be graduated in correspondence with the changing facts.

There is a distinction not to be ignored between the facts that determine subjection to a tax and those that measure its amount. "Classification good for one purpose may be bad for another." *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 38. The case cited drew a distinction between graduation of the burden and uncondi-

tional exemption. The business conducted by these appellants is not subjected to a tax *because* it is in several counties. It is taxed because it is the business of operating chain stores, and its spread over counties is only one circumstance, along with others, to be considered by the Collector in determining how much it has to pay. The factor may be inconclusive if our search is for mathematical exactness. This is far from saying that it is to be rejected as irrelevant. None of the factors measuring this tax will answer to a test of certainty. Even where the business is kept within a single county, there is no certainty that a chain of thirty stores will so differ from one of fifty either in its method of organization or in the proportionate returns that the first should pay a tax at one rate for every store, and the second at another. The like is true where organization is affected by territorial expansion. There is a relation surpassing mere irrelevance between the essential character of the business and its territorial spread beyond the unit of its origin. Even if this is doubtful *a priori*, it is made apparent or probable by statistics and experience. A court will go no farther.

What has been written has discovered differences between local chains and others, differences in organization at the centre and in opportunity at the outer rim. The differences need not be great. *Tax Commissioners* v. *Jackson*, *supra* at p. 538. This is true even of the classes that may be described as primary, those accompanied by a division between a tax and no tax. It is true even more plainly of subclasses, the secondary divisions corresponding to graduations of the scale. How slight may be the variance that will mark a permissible classification between a tax and none at all has illustration in the case at hand. The prevailing opinion upholds the power of the state to discriminate between integrated and voluntary chains, though the difference of organization is slender and the inequality of economic benefit uncertain and disputed. Slender though the difference of organization is, it is real enough to rescue classification from the reproach of an arbitrary preference. It will not do to shut one's eyes to the motive that has led so many legislatures to lay hold of this difference and turn it into a basis for a new system of taxation. The system has had its origin in the belief that the social utility or inutility of one group is less or greater than that of others, and that the choice of subjects to be taxed should be adjusted to social gains and losses. Courts would be lacking in candor if they were not to concede the

presence of such a motive behind this chain store legislation. But a purpose to bear more heavily on one class than another will not avail without more to condemn a tax as void. *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 95; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 126; *Sproles* v. *Binford,* 286 U. S. 374, 394; *Stephenson* v. *Binford,* — U. S. —, December 5, 1932. We must know why the discrimination is desired, to what end it is directed and the relation between end and means. If the motive is vindictiveness, ensuing in mere oppression, the result may be one thing. If the motive and the end attained are the advancement of the public good, the result may be quite another, unless preference and repression go so far as to outrun the bounds of reason. The legislature has determined with the approval of the court that an integrated chain is a taxable class separable from independent dealers and even from chains that are merely cooperative leagues. If these differences suffice to establish a basis for distinction between a tax and none at all, smaller differences may suffice for the graduation of the scale. The legislature has found them in those variations of degree that separate a chain within the territorial unit of the locality from chains that are reaching out for wider fields of power. There is no need to approve or disapprove the concept of utility or inutility reflected in such laws. *State Board of Tax Commissioners* v. *Jackson, supra* at p. 537. The concept may be right or wrong. At least it corresponds to an intelligible belief, and one widely prevalent today among honest men and women. Cf. *Otis* v. *Parker,* 187 U. S. 606. With that our function ends.

Systems of taxation are not framed, nor is it possible to frame them, with perfect distribution of benefit and burden. Their authors must be satisfied with a rough and ready form of justice. This is true in special measure while the workings of a novel method are untested by a rich experience. There must be advance by trial and error. Taxes upon chain stores are not exempt from these infirmities. To what extent there is a change of form and spirit when a business ceases to be local is not a question of law. *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co., supra.* In essence it is one of fact. There is a presumption that the legislature did not classify along the lines of counties without study of the relevant data or without an informed and considered judgment. Its findings are not subject to annullment by a court unless facts within the range of judicial notice point to them as wrong.

In discarding as arbitrary symbols the lines that it has chosen, there is danger of forgetting that in social and economic life the grooves of thought and action are not always those of logic, and that symbols may mean as much as conduct has put into them.

Holding these views, I find it unnecessary to consider whether the statute may be upheld for the additional reasons that have been stated by Mr. Justice BRANDEIS with such a wealth of learning. They present considerations that were not laid before us by counsel either in the briefs or in the oral argument, and a determination of their validity and weight may be reserved with propriety until the necessity emerges.

My vote is for affirmance.

I am authorized to state that Mr. Justice STONE concurs in this opinion.